(23,955)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1913.

## No. 804.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR,

*vs.*

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., January 30, 1914.

1 UNITED STATES OF AMERICA,
*State of Nebraska, ss:*

*Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 16th Day of September,* 1913.

Present:

Hon. Monoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

No. 17695.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, and ELIZABETH LEAHY, Appellants,
vs.
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Appellees.

Be it remembered, That on the 5th day of July, 1912, there was filed in the office of said clerk of the supreme court of the state of Nebraska, a certain transcript in the above entitled cause, in which said transcript it appears as follows:

Said cause was commenced in the District Court of Dakota County, Nebraska, on the 16th day of January, 1911, by the plaintiffs
2 filing in the office of the clerk of said court their verified petition, which, omitting caption and verification, states their cause of action in the words and figures following, to-wit:

1. That these respective plaintiffs are, and were at the several times stated herein, residents, citizens and real estate owners and tax payers of Dakota county, Nebraska; that the plaintiff Henry W. O'Neill now owns and occupies, and at the several times herein mentioned owned and occupied the southwest quarter of the southeast quarter of section 29; the southwest quarter of the southwest quarter of section 28; and the northwest quarter of the southwest quarter of section 28 all in township 29 north, range 8 east in Dakota county, Nebraska, which was at said several times cultivated and improved land and of great value, to-wit: of the value of $100 per acre; and the plaintiff Cornelius K. Hefferman now owns and occupies, and at the several times herein stated owned and occupied, the northeast quarter of the northwest quarter, and the northwest

quarter of the northeast quarter, of section 36, township 29, range 7 east of the 6th principal meridian in said county which is and at the several times herein mentioned was improved and cultivated land and of great value, to-wit: of the value of $150 per acre; and the plaintiff Elizabeth Leahy now owns and occupies, and at all times herein mentioned owned and occupied, the southeast quarter of the southeast quarter of section 25, township 29, range 7 east of the 6th principal meridian in said county which is and at all times herein mentioned was in a high state of cultivation and of great value, to-wit: of the value of $150 per acre.

2. That the incorporated village of Jackson, which has a population of about four hundred people, is situate in sections 35 and 36, township 29, range 7 east of the 6th principal meridian in Dakota county, Nebraska, and that to the northwest thereof, and
3 coming close to said village are hills intersected and divided by sharp ravines through one of which to the northwest of said village, flows in a southeasterly direction, a well defined stream or water-course known as Elk creek, which constantly contains running water and has sharp and well defined banks and a channel into which flows, above said village of Jackson, the waters of tributary streams and into which also flow the waters of many thousands of acres of adjacent land in Dakota and Dixon counties, Nebraska, for many miles along said stream, all of which said waters are carried down in said Elk creek and discharged at its mouth near said village of Jackson on to low, flat lands at which place the channel of said Elk creek practically ceases; that close to the southern boundary of said village of Jackson said Elk creek discharges all its waters onto a tract of flat, low, marsh or swamp land embracing from 18 to 20 contiguous sections forming a compact body, and frequently by reason of melting snows and heavy rains, the banks of said Elk creek are overflowed and the waters thereof extend onto the small valley through which it has its course, and all of said water is carried down stream and cast upon said low lands and they are flooded for many days by reason thereof from a depth of one to three feet. That beginning at the southern boundary of said village of Jackson and running somewhat east of south is the swamp, low and marsh lands herein mentioned onto which said waters are so discharged, and from thence onto the foot of said low, swamp or marsh lands, which are found near sections 34 and 35, township 28, range 8 east of the 6th principal meridian in said county, said waters so discharged have a sluggish natural drainage to the southeast and to the Missouri river. That said low, swamp or marsh lands are the natural place of deposit of all of the waters of said Elk creek.

3. That the above described lands of these plaintiffs lie sharply to the northeast of said village of Jackson a distance of from one
4 to two miles and are never flooded by the waters of said Elk creek or said flood waters thereof, and are entirely free therefrom, and distant from the nearest point on said Elk creek and said low lands from one to two miles.

4. That there is a range of hills or high lands running from a point far to the northward of said village of Jackson to a point far to the south thereof and swirting said low lands on the west thereof

known as the west bluffs or bank of the Missouri river bottom and all of the waters from said Elk creek, including said flood waters are thrown upon the low, valley, swamp or marsh lands of said Missouri river bottom, the natural course of which, when unobstructed is along and upon said 20 odd sections herein mentioned and described and to the south and somewhat to the east of said village of Jackson to a distance of many miles, and no portion of said waters are ever, in the course of nature, discharged upon or in the direction of the said lands of these plaintiffs, or nearer than from one to two miles thereof.

5. That on the 4th day of September, 1909, the said defendants and other residents of Dakota county, Nebraska, filed in the office of the clerk of the District Court of said county a paper purporting to be a petition and articles of association under chapter 161 of the laws of the state of Nebraska for the year 1905 for the purpose of securing an order of said court organizing what the defendants have been pleased to name, or call, Drainage District No. 2 of Dakota County, Nebraska. And thereafter on the 23rd day of October, 1909, which was a judicial day of the September 1909, term of said court, said defendants and said other persons associated with them, secured from said district court an ex parte order declaring that said body of lands to the southeast of said village of Jackson, herein described as low, swamp and marsh land, embracing portions of sections 31, 32, 34, and 35, in township 29, range 7 and 8 east of the 6th principal meridian, and portions of sections 1, 12 and 13 in township 28, range 7 east of the 6th principal meridian and portions of sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, and 34, in township 28, range 8 east of the 6th principal meridian in said county, to be and constitute the so-called Drainage District No. 2 of Dakota County, Nebraska, and a public corporation, body politic and corporate under said Chapter 161 of the Laws of Nebraska for the year 1905; that said so-called Drainage District No. 2 of Dakota County, Nebraska, has no other or different organization or charter than said order and does not exist by virtue of any other authority than said order of said court.

6. The plaintiffs further aver that no portion of their lands herein described lie within the boundaries of said so-called Drainage District No. 2 of Dakota County, Nebraska, or adjacent thereto but on the contrary the same are from one to two miles therefrom and in almost an opposite direction.

7. That the said defendants Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell and each of them are and were at the several times herein stated, residents and citizens of said Dakota county, Nebraska, and that they now claim to be and to constitute the board of supervisors of said alleged Drainage District No. 2 of Dakota County, Nebraska, which said alleged district they falsely assert and claim was created and made a public corporation and body politic and corporate under the provisions of said Chapter 161 of the laws of the state of Nebraska for the year 1905 by the order of said court and in no other way.

8. The plaintiffs allege that the said defendants now falsely claim

and assert that as such alleged board of supervisors of said Alleged Drainage District No. 2 of Dakota County, Nebraska, they have
6 lawful right and authority to enter upon the above described lands of these plaintiffs respectively and to occupy portions thereof and to exclude these plaintiffs therefrom, and to make and construct upon said lands a large artificial ditch or canal, to-wit, a ditch or canal about 60 feet wide at the top, 20 feet wide at the bottom and 30 feet deep and to throw and leave the dirt excavated therefrom upon the plaintiff's said lands, from a point at or near the mouth of said Elk creek where is has a well defined channel and banks and before it discharges its waters upon said low lands herein described, and to perpetually carry said waters by means of said ditch or canal across the said lands of these plaintiffs for all time, and for a distance of two miles and empty the same into what is known as Jackson lake, a body of water covering about 40 acres of land and located on and being a part of the land of the plaintiff Henry W. O'Neill herein described, and there to permit said water to remain without any outlet or channel therefrom. And that said defendants have taken steps to that end and now threaten to and will carry out said purpose immediately unless restrained by the order of this court and to that end and for that purpose said defendants are now advertising the letting of a contract or contracts to proposed bidders to enter upon the said lands of these plaintiffs and to excavate and construct such ditch or canal as herein described, which if done by them will be to the great, lasting and permanent injury and damage of these plaintiffs and their said lands.

These plaintiffs further state that none of the said defendants have or ever have had, any right or authority to enter upon any of the said lands of these plaintiffs for the purpose of constructing said proposed ditch or for any other purpose whatever, because no proper or legal steps have ever been taken by said defendants or any of them to that end nor have any condemnation proceedings ever been
7 had to appropriate, take or condemn any part of said real estate for ditch purposes or for any other purpose whatever.

9. That the construction of such ditch or canal across the said lands of the plaintiff Henry W. O'Neill will permanently and for all time injure and damage the same to the full sum of $10,000 and will permanently and for all time damage and injure the said lands of the plaintiff Cornelius K. Hefferman to the full sum of $10,000, and will permanently and for all time injure and damage the said lands of the plaintiff Elizabeth Leahy to the full sum of $4,000, to prevent which the plaint-ffs have no speedy or adequate remedy at law.

10. These plaintiffs aver that it is not within the power or scope of the organization of said alleged Drainage District No. 2 of Dakota county, Nebraska, or within the power of its said alleged officers the defendants herein to condemn or to take the right of way across the said lands of these plaintiffs or to construct a ditch or canal thereon or across the same or to authorize the same, or to use any portion of said lands for the said ditch or canal, or for the purpose of dumping dirt thereon or to authorize any other person or persons to do so, or

to construct such ditch or canal or carry the waters of said Elk creek across or over the lands of these plaintiffs or any part thereof, or empty the same into said Jackson lake as it is herein averred they intend to do.

11. These plaintiffs aver that no provision has been made or is contemplated by said defendants for the drainage of said Jackson lake of the waters from said Elk creek to be thrown therein by them as herein stated and contemplated, and that said Jackson lake is surrounded by thousands of acres of cultivated land of great value and the taking of the water from said Elk creek through said proposed ditch or canal across the said lands of the plaintiffs and discharging the same into said lake will raise the latter greatly beyond its
8 banks and cause said waters to overflow therefrom and submerge said lands of the plaintiff Henry W. O'Neill and other lands situated in and near said lake, amounting to hundreds of acres, and will render all said land practically valueless for all time to come.

12. These plaintiffs aver that said defendants claim to have authority by virtue of being what they are pleased to call themselves the board of supervisors of the alleged Drainage District No. 2 of Dakota county, Nebraska, claimed to have been organized as aforesaid under the act of the legislature of the state of Nebraska aforesaid; that said alleged incorporation or Drainage District No. 2 of Dakota county, Nebraska, has not formulated or filed articles of incorporation under and according to the general statutes of the state of Nebraska on the subject of corporations, and its only alleged charter or authority for existence is contained in said petition and said articles of association filed in the office of the clerk of the district court of Dakota county, Nebraska, as aforesaid, and said order of said district court of said county issued under section three, chapter 161 of the Laws of the state of Nebraska for the year 1905, a copy of which is hereto attached and incorporated herein as a part of this petition marked exhibit "A."

13. And the plaintiffs aver that the district court of Dakota county, Nebraska, had no jurisdiction, power or authority to make or issue an order incorporating said alleged Drainage District No. 2 of Dakota county, Nebraska, or to exercise the legislative power necessary to create said alleged Drainage District No. 2 of Dakota county, Nebraska, a body corporate and politic, and that said order of said court issued as aforesaid is null and void and is in direct violation of Section 1, Article 2 of the Constitution of the State of Nebraska which reads as follows: "The powers of the government of this state are divided into threee distinct departments, the
9 legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressed, directed or permitted."

That said Section 3 of Chapter 161 of the Laws of the state of Nebraska for the year 1905 is in violation of Section 1, Article 2 of the Constitution of the state of Nebraska, in so far as it attempts to authorize the District Court of Dakota county, Nebraska, to create a

corporation and body politic, as the creation of a corporation and body politic is a legislative and not a judicial function or power, and the attempt of the legislature, by said act, to authorize the Judge of the district court of said county to constitute and create a corporation and body politic is not a judicial authority but is a legislative authority to be exercised by the legislative department of the state alone.

14. And these plaintiffs aver that the natural drainage of all the waters of said Elk creek on to said low lands is to the southeast of the place where they are emptied thereon by said creek, and from thence southerly and not upon the lands of the plaintiffs or in the direction thereof, and that the said defendants are in no manner attempting to ditch or canal said low lands in the direction of the natural drainage of said waters through said lands, or in any other way, but are attempting to take, and intend to take the waters from said Elk creek before they reach said low lands and while they are confined in the channel of said creek and divert them from said low lands and across the said lands of the plaintiffs herein described, and in almost an opposite direction from their natural flowage.

15. The plaintiffs aver that the said defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota county, Nebraska, and have no lawful authority or right whatever under the Constitution of the state of Nebraska and the Constitution of the United States of America to invade the plaintiffs' said land herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof, and that to permit them to do so would be a violation of Section 21, Article 1 of the Constitution of the state of Nebraska which provides, that: "The property of no person shall be taken or damaged for public use without just compensation therefor," and of Section 1, Article 14 of the United States of America which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

16. The plaintiffs aver that the single object and purpose of the defendants in what they intend and threaten to do as herein alleged, is wholly private and in the exclusive pecuniary interest of the so-called corporators of said alleged Drainage District No. 2 of Dakota county, Nebraska, including the defendants and that said alleged Drainage District No. 2 of Dakota county, Nebraska has no public character or function whatever and does not pretend to have any authority other than that which is strictly private and its alleged incorporation was and is for the exclusive purpose of enabling the defendants and their associates to accomplish in aggregate capacity what the respective individuals thereof could not do, that is, to take the private property of other private citizens, including the plaintiffs herein, for strictly private uses and purposes and for their own indi-

vidual benefit in violation of the Constitution of the state of Nebraska and of the Constitution of the United States of America.

Wherefore the plaintiffs pray that a temporary injunction issue herein to said defendants and to each of them strictly com-
11 manding and enjoining them and each of them from in any manner entering upon or attempting to enter upon the said premises of the plaintiffs in this petition described or upon any portion or part thereof and from constructing or attempting to construct or permitting others to construct or attempt to construct any ditch or canal over or across the same or over or across any portion of the same and from throwing upon the lands of the plaintiffs or any part thereof any dirt or material to be excavated from any such ditch or canal and from taking or diverting the waters of said Elk creek from the channel thereof and conducting or permitting the same to be conducted across the lands of the plaintiffs or any part thereof, and from emptying the same into the said Jackson lake, and from permitting or encouraging any other person or persons or so-called contractor or contractors, agent, servant or employer, from doing any or all of said acts, and that upon the final hearing of this case said injunction be made perpetual by the judgment of this court, and that the plaintiffs have such other and further relief in the premises as may be just and agreeable to equity, together with their costs and disbursements expended herein.

*Exhibit "A" of Petition.*

SECTION 3. All owners of real estate in said District who have not signed said articles of association and who may object to the organization of said Drainage District, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection, or objections in writing, if any they may have, why such Drainage District should not be organized and declared a public corporation of this state, and why their land will not be benefitted by drainage, and should not be embraced in said Drainage District, and liable to taxation for draining the same; and all such objections shall be
12 heard by the court in a summary manner, without any unnecessary delay, and in case such objections are overruled, the district court shall, by its order entered of record, duly declare said Drainage District a public corporation of this state. The fact that said district shall contain one hundred sixty acres or more of wet overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefitted thereby, then the court may exclude such real estate as will not be benefitted, and declare the remainder a district as prayed for.

On January 16, 1911, an order was made by the County Court of

Dakota county, granting a temporary injunction in the words and figures following, to-wit:

It is hereby ordered that an injunction be granted herein enjoining the defendants and each of them from in any manner entering upon or attempting to enter upon the premises of the plaintiffs or any of them, to-wit: the southwest quarter of the southeast quarter of section 29; the southwest quarter of the southwest quarter of section 28; the northwest quarter of the southwest quarter of section 28, township 29 north, range 8 east of the sixth principal meridian; the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section 36, township 28 north, range 7 east of the sixth principal meridian; the southeast quarter of the southeast quarter of section 25, township 29 north, range 7 east of the sixth principal meridian, or any portion thereof and from constructing or attempting to construct, or permitting others to construct or attempt to construct any ditch or canal over or across the same or over or across any portion of the same, and from
13 throwing upon the said lands of the plaintiffs or any part thereof any dirt or material to be excavated from any such ditch or canal, and from taking or diverting the waters of Elk creek from the channel thereof and conducting or permitting the same to be conducted across the lands of the plaintiffs or any part thereof, and from emptying the same into Jackson lake, and from permitting or encouraging any other person or persons or so-called contractor or contractors, agent, servant or employee from doing any or all of said acts. Said temporary injunction to be issued by the clerk of the District Court of Dakota county, Nebraska, upon the plaintiffs executing and delivering to said clerk an undertaking to the defendants in the sum of one thousand ($1,000.00) conditioned as required by law, with surities to be approved by said clerk.

On February 13, 1911, an order was made in this case by the district court of Dakota county, Nebraska, as follows:

Now, at this time, to-wit: February 13, 1911, it being the first day of the regular February, 1911, term of this court, this cause coming on to be heard on the motion of the defendants for plaintiffs to file an additional or supplemental undertaking in the sum of $4,000.00, and was submitted to the court, on consideration whereof the court sustains said motion and orders plaintiffs to file their supplemental or additional undertaking instanter, when it is the further order of the court that a copy of the defendants' answer be served on the plaintiffs within one week, and that the defendants plead thereto within ten days thereafter.

On February 13, 1911, the plaintiffs filed an additional injunction undertaking in the sum of $4,000.00.

On February 18, 1911, the defendants John T. Daley, Jacob F. Leamer, Fred Bartels, Glen Armour, and Charles H. Maxwell, filed an answer in this case in the words and figures followings, to-wit:

Come now the defendants in the above entitled cause, and
14 for answer to the petition of the plaintiffs allege and state:
Paragraph I. The defendants herein deny each and every

allegation set forth in the petition of the plaintiffs, except as hereinafter specifically admitted or otherwise answered.

Paragraph II. They admit that the plaintiffs are residents, citizens, real estate owners and tax payers of Dakota county, Nebraska. They deny that Henry W. O'Neill, plaintiff, owns the southwest quarter of the southeast quarter of section number twenty-nine (29) township number twenty-nine (29) north, range number eight (8), or that the ditch or canal crosses or interferes with said land in any way, but these defendants admit that the plaintiff Henry W. O'Neill owns and occupies the other lands as alleged and set forth in paragraph one of said petition and that he or Mary Agnes Swift owns Lot four (4) of the southeast quarter of the southeast quarter of said section number twenty-nine (29), but deny that said land is of the value of one hundred ($100.00) Dollars per acre, or any sum in excess of seventy-five ($75.00) dollars per acre.

These defendants admit that the plaintiff Cornelius K. Heffernan owns and occupies the land described, as alleged in paragraph one of the petition as owned by him, but deny that it is of the value of one hundred fifty ($150.00) dollars per acre, and allege that it is not worth any sum in excess of one hundred ($100.00) dollars per acre.

These defendants admit that Elizabeth Leahy now owns and occupies the land as alleged in paragraph one of the plaintiffs' petition, but they deny it is of the value of one hundred fifty ($150.00) dollars per acre, and allege that it is not worth any sum to exceed one hundred ($100.00) dollars per acre.

These defendants admit that Jackson is an incorporated village of about four hundred (400) people, and situate in section
15 thirty-five (35) and thirty-six (36) in township twenty-nine (29) range seven (7) and that close to the said village are hills intersected by ravines, through one of which in a southeasterly direction flows a water course known as Elk creek, and which continually contains running water, and has a well defi-ed bank and channel above said village of Jackson, but these defendants deny that the channel of Elk creek ceases at the village of Jackson, but state that there is a natural channel for a distance south of said village of Jackson, which is supplemented and continued by an artificial channel from south of said village of Jackson to where the water of said Elk creek flows into what is known as Omaha creek in or near section two (2) township twenty-seven (27), range eight (8) in said county of Dakota and state of Nebraska.

These defendants admit that the lands south and east of Jackson are flat lands and that in time of floods and high waters the channel of said Elk creek south of said village of Jackson is insufficient to carry the water of said creek, and that frequently said lands are overflowed and become swampy and marshy, and allege that there are seven thousand (7,000) acres of said land affected, and that the natural flowage of water off of said lands is to the southeast and is sluggish.

These defendants further admit that the lands owned by the plaintiffs lie to the east and northeast of the village of Jackson, and are from one to two miles therefrom, and that in recent years have not

been flooded by waters of Elk creek, and that the nearest point of said Elk creek to the said lands is from one to two miles.

These defendants admit that no portion of the waters of the said Elk creek as said stream now runs are discharged upon the lands of the plaintiffs.

These defendants admit that on the 4th day of September, A. D. 1909, these defendants with other residents of Dakota county,
16 Nebraska, filed in the office of the clerk of the district court of said county a petition and articles of association for the purpose of securing an order of said court organizing a Drainage District, which was called and is known as Drainage District Number two (2) of Dakota county, Nebraska; that said petition and articles of association were prepared and filed, and the order secured under the Laws of the state of Nebraska, as set forth in Section 5561 to 5597 both inclusive of Cobbey's Annotated Statutes (Edition of 1909), but these defendants deny that said petition and articles of association were filed under Chapter 161 of the Laws of the state of Nebraska for the year 1905, but allege and state that it was under the said laws, including amendments made thereto and is as above set forth.

These defendants further deny that it was an exparte order that was secured declaring said body a corporation, and allege and state the facts to be that it was after the filing in the district court of Dakota county, Nebraska, of a petition and the proposed articles of association, and after regular service of notice of the pendency of said proceeding or action, and upon a hearing duly had in open court, after taking of evidence, and after the court had found it was a work of public utility and that the public health, convenience and welfare would be promoted thereby, and that in pursuance of law, and within twenty days after said order creating this corporation these defendants submitted to the secretary of state a certified copy of the record relating thereto, which was filed in the office of the secretary of state and recorded therein in the manner provided under the general Laws of the state of Nebraska concerning corporations.

These defendants further allege that this is not a proper action in which to raise the question of the legality of the organization of this corporation, nor can said question be so raised.

17 These defendants admit that no portion of the lands of the plaintiffs hereinbefore described lie within the boundaries of Drainage District Number Two (2) of Dakota county, Nebraska, and admit that they do not border upon the said district.

These defendants admit that they are residents, citizens, and tax payers of Dakota county, Nebraska, and that they claim to be and constitute the board of supervisors of Drainage District Number Two (2) of Dakota county, Nebraska, but these defendants specifically deny that they assert and claim that said district was claimed and made a public corporation and body politic under the provision of Chapter 161 of the Laws of Nebraska for the year 1905 alone, and they allege and state to the court that they and each of them are the duly elected, qualified and acting supervisors of said Drainage District Number Two (2) of Dakota county, Nebraska, and that said Drainage District has been fully, lawfully and regularly cre-

ated, organized and made a public corporation and body politic of the state of Nebraska.

These defendants deny that they claim to have the present right and authority to enter upon the lands of the plaintiffs and make and construct any ditch or canal thereon, but, after they shall have paid to the County Judge of Dakota county, Nebraska, for the benefit of the plaintiff the sums fixed by the appraisers of right of way as hereinafter set out, they admit that they claim they will have, and allege that they will have the right and authority to enter upon the lands of the plaintiffs and to construct and make upon said lands a large ditch or canal, to-wit: A ditch about thirty feet wide at the bottom and fifty or sixty feet wide at the top, and about fifteen feet deep, and to throw and leave the dirt excavated therefrom on either side of said ditch from a point at or near where said creek now crosses the Chicago, Burlington and Quincy Railroad in the south-
west quarter of the northeast quarter of section thirty-five
18 (35) township twenty-nine (29) range seven (7) in said
county over and across the lands described in the petition of the plaintiffs as owned by them and to perpetually carry the said water by means of said ditch or canal across the said lands of said plaintiffs for all time, and for a distance of about two miles and empty same into what is known as Jackson lake, and they admit that said defendants have taken steps to that end, and will carry out said purpose, unless restrained by the order of this court, and admit that these defendants have advertised and have let contracts to enter upon said lands, and to excavate or construct such ditch or canal as above described, but these defendants deny that said Jackson lake has no outlet or channel therefrom, and deny that said waters will remain therein, and deny that the construction of said ditch or canal, and the carrying of said water across the said lands will be a lasting and permanent injury to the plaintiffs or to their lands.

These defendants deny each and every allegation in paragraphs nine, ten, eleven, twelve, thirteen, fourteen, fifteen and sixteen of said petition.

Paragraph 3. For further answer to the petition of the plaintiffs these defendants allege and state that they with other owners of real estate and tax payers of Dakota county, Nebraska, on the 4th day of September, 1909, filed in the manner provided by law a petition and articles of association under Chapter 161 of the Laws of the state of Nebraska for the year 1909, being Sections 5561 and 5597 both inclusive of Cobbey's Annotated Statute- (Edition of 1909).

That they made due service of the notice of the pendency of said action as provided by law upon each and all of the owners of real estate included within said district, and that thereafter on the 23rd
day of October, 1909, which was a regular day of the Sep-
19 tember 1909 term of the said court, after a hearing duly had,
and the taking of evidence said corporation was by the said district court duly declared a public corporation of said state of Nebraska, under said law.

That in due time and in the manner provided by law, the defendants caused to be filed in the office of the secretary of state of Ne-

braska and in the office of the county clerk of said Dakota county, Nebraska, certified copies of the record of the organization of said corporation, the copy filed in the office of the county clerk being accompanied by a plat of said district.

That after an election duly called and had supervisors were elected as provided by said law, and the defendants herein are such supervisors, or their successors in office, duly and regularly elected who have duly and regularly qualified and accepted office, and are now engaged in the performance of their duties.

That in the manner provided by law they employed a competent engineer and secured to be made a typographical survey of said district, together with maps and profiles and a full and complete plan for drainage, re-claiming and protecting the lands in said district from the overflow or damage by flood, together with all physical characteristics, the right of way, road bed, together with all bridges, highways, ditches, levies, railways and each and all improvements of every kind together with an assessment of benefits to be derived from said proposed improvement, which report having been duly presented to said board of supervisors, and by them considered, and after certain amendments thereto was duly and regularly approved, adopted and confirmed as the method by which the lands within the said Drainage District could be drained, reclaimed and protected from overflow or damage by water and flood, and that said report so made, adopted and confirmed provided for a ditch similar in character to that described by the plaintiffs in their petition, (commencing at a point in the southwest quarter of the northwest quarter of section thirty-five (35) township twenty-nine (29) range seven (7), near where Honey creek flows into said Elk creek, said ditch flowing in an easterly direction parallel with the said Chicago, Burlington and Quincy Railroad to or near the east line of section thirty-five (35) township twenty-nine (29) range seven (7), thence in a northeasterly direction to near where the north line of the southwest quarter of the southwest quarter of section twenty-eight (28) township twenty-nine (29) range eight (8) intersects the south bank of what is known as Jackson lake).

That said route is the most feasible, the most economical, and the safest method of taking care of the water of the said Elk creek; that after having adopted said plan of drainage, and after having failed to agree with these plaintiffs as to the price of said right of way required for the purpose of constructing said ditch, these defendants by a proper proceeding instituted before the County Judge of Dakota county, Nebraska, by a petition for that purpose filed with said County Judge, describing the course of said proposed ditch, its width, purpose, initial and terminal points, and its character, secured and had appointed by the County Judge of Dakota county, Nebraska, in the manner provided by law for the exercise of the right of condemnation of right of way under the laws of eminent domain, three appraisers, disinterested free holders of Dakota county, Nebraska, who appraised the value of the right of way for said ditch through each and every tract of land described in plaintiff's petition, said right of way being two hundred feet in width, which furnishes ample

room for the deposit of waste dirt, and to fully protect each and all of the plaintiffs from any loss or damage, and said board of appraisers having been duly sworn and qualified, viewed said premises and fixed the damage due each of said plaintiffs by reason of the taking of said right of way, which said report was filed in the
21 office of the County Judge of Dakota county, Nebraska, on the 17th day of September, 1910, and allowed and awarded to the plaintiffs the following sums for the respective tracts:

For said right of way and across the northeast quarter of the northwest quarter of section thirty-six (36) township twenty-nine (29) north, range seven (7) owned by Cornelius K. Heffernan, the sum of five hundred sixty and no/100 ($560.00) dollars, for said right of way over and across the northwest quarter of the northeast quarter of section thirty-six (36) township twenty-nine (29) north, range seven (7), owned by Cornelius K. Heffernan, the sum of three thousand two hundred eighty-three and no/100 ($3,283.00) dollars.

For said right of way over and across lot four (4) or the southeast quarter of the southeast quarter of section twenty-nine (29) township twenty-nine (29), range eight (8), owned by Henry W. O'Neill, the sum of three thousand two hundred sixty and no/100 ($3,260.00) dollars; for the said right of way over and across the southwest quarter of the southwest quarter of section twenty-eight (28) township twenty-nine (29) range eight (8), owned by Henry W. O'Neill, the sum of six hundred nineteen and 13/100 ($619.13) dollars; for said right of way over and across lot five (5) of the northwest quarter of the southwest quarter of section twenty-eight (28) township twenty-nine (29) north, range eight (8), owned by Henry W. O'Neill or Mary Agnes Swift, the sum of one hundred ($100.00) dollars.

For said right of way over and across the southeast quarter of the southeast quarter of section thirty-five (35) township twenty-nine (29) range seven (7), owned by Elizabeth Leahy, the sume of nine hundred and no/100 ($900.00) dollars.

That neither of said plaintiffs have appealed from said appraisement, and the same is now a valid and subsisting award fix-
22 ing the damage of each and all of said plaintiffs for the taking of said right of way, and that by reason of said proceedings, and by reason of said appraisement and award, and when the said sum shall have been deposited with the County Judge of Dakota county, Nebraska, the said plaintiffs will now own the said rights of way over and across said real estate and will have no interest therein, except to ask and receive the payment of said award.

That the outlet of said ditch, called Jackson lake or Cut-off lake, was formerly the channel of the Missouri river at low water stage, and except when its waters are at an unusually low state, has a continuous channel carrying running water from and to said lake to and from said river, and that — a high stage of water in said Missouri river the waters of said river flow into said lake at the north and west end thereof and through said lake and by way of the outlet above described, to the said river, and that said lake is wholly within

the high bank of said river and is in fact a part of said Missouri river.

That all of the lands between the south bank, or high bank of said lake and the present low water channel of the said Missouri river is what is commonly called and known as sand bar land, and is made land, the said river having since the government survey thereof washed away all of the earth there at the time of said survey to the full depth of its channel; that said land is low and subject to overflow form any ordinary high water of the Missouri river, and is of a sandy character so that water percolates freely from said lake to the said river and from said river to said lake.

Wherefore these defendants pray that the temporary injunction heretofore granted may be dissolved; that the plaintiffs' cause of action may be dismissed; that the defendants may go hence without day for the costs herein expended.

On April 24, 1911, the plaintiffs filed a reply to the answer of the defendants in the words and figures following, to-wit:

23 Now comes the plaintiffs and reply to the answer of the defendants as follows:

1. These plaintiffs deny each and every allegation contained in the defendants' answer which is not an admission of the allegations of the petition filed herein, or of some of them and specifically deny that Drainage District No. 2 is or ever was a corporation under the laws of this or any other state.

2. These plaintiffs aver that the Act of the Legislature of the state of Nebraska for the year 1905, entitled "An Act for the organization and government of Drainage Districts, etc.," consisting of 39 sections, approved March 25, 1905, and comprising part of the Laws of the state of Nebraska, for the year 1905; and the subsequent Act of the Legislature of the state of Nebraska for the year 1907, entitled, "An Act to provide for Drainage Districts to drain wet lands, etc.," approved March 27, 1907, consisting of thirty-two sections, and comprising a part of the laws of the state of Nebraska for the year 1907, are in direct and specific violation of Section 1 Article 11*b* of the Constitution of the state of Nebraska, entitled "Miscellaneous Corporations," which reads as follows: "No corporation shall be created by special law, nor its charter extended, changed or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the Legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed," in so far as the same or any part thereof confers or attempts to confer upon the district court of the state of Nebraska, jurisdiction, authority, or power to create or to participate in or to aid in the creation of a corporation; and are in violation of Section 1, Article 2 of the Constitution of the state of Nebraska, which

24 provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging

to either of the others, except as hereinafter expressly directed or permitted," in so far as the same confer or attempt to confer upon the district courts of the state of Nebraska jurisdiction, authority, or power to organize or to participate in the organization of a drainage district and in so far as the same confer or attempt to confer jurisdiction, authority or power on the district court of Dakota county, Nebraska, to organize or to participate in the organization of Drainage District No. 2 of said county.

3. And these plaintiffs further replying to said answer aver that sections 14, 15, 16 and 17 of the Act of the Legislature of the state of Nebraska, for the year 1905, entitled, "An Act for the organization and government of Drainage Districts, etc.," approved March 29, 1905, are unconstitutional and void under the provisions of the Constitution of the state of Nebraska set out and copied in paragraph two hereof, and of Section 1 of the 14th Amendment to the Constitution of the United States of America, in so far as Section 14 of said Act requires the plaintiffs or any of them or any other person to make an application in writing to the board of supervisors of Drainage District No. 2 of Dakota county, Nebraska for compensation and damages sustained by them or any of them by reason of any proceedings or steps taken or to be taken under said Act, and in so far as said Act or Acts require the said plaintiffs or any of them or any other person to file any objections which they may have to the proposed assessment shown or required to be shown by the notice provided for in Section 13 of said first Act by the estimate, plats and plans of the engineer as to the amount of the proposed assessment against their respective lands, etc., said section and each of said acts being incorporated herein and made a part of this reply by reference. And Section 15 of said first Act is unconstitutional and void under the provisions of the Constitution of the state of Nebraska herein set out and of Section 1 of the 14th Amendment to the Constitution of the United States of America, in so far as it confers or attempts to confer authority upon the board of supervisors of Drainage District No. 2 of Dakota county, Nebraska, the power or authority to hear and determine whether the requisite notices have been given as required by said Act and if they find that due notice has not been given to continue the hearing on any claim or claims that may be filed before them or that an owner of any property sought to be taken may have contemplated by Section 14 of said Act, to a date to be fixed by them and to order notices to be served on the plaintiffs or on any of them as provided in said Act and when they find that due notice has been given authorizing or conferring upon them power to proceed to hear any objection or objections which may be filed as in said Act provided in all claims for damages and other matters upon which issue has been made may be made as provided in Sections 13 and 14 of said first act, and conferring upon them power to subpœna, swear and examine witnesses and to do all other matters necessary and incidental to a proper hearing of said issues or to exercise any judicial functions whatever, etc., because the same usurps and trenches upon the province of the established judiciary of the state of Nebraska, and

is in violation of Section 1, Article 6 of the Constitution of Nebraska, which reads as follows: "The judicial power of this state shall be vested in the supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by the law for cities and incorporated towns," in that said Drainage District No. 2 and said board of supervisors are not and cannot by statute be made a judicial
26 tribunal and have not and cannot under the Constitution of the state of Nebraska exercise any judicial authority or power over the rights or property of the plaintiffs or of any of them or of any other person or persons. And the said sections of said acts are in violation of Section 1, of the 14th Amendment of the Constitution of the United States of America which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," as said sections of said acts as well as said entire acts abridge the privileges and immunities of the plaintiffs and of each of them, who are and at all times heretofore have been citizens of the United States, and deprive them and each of them of their property without due process of law and deny to them and to each of them the equal protection of the laws.

4. And these plaintiffs further aver that neither the said defendants nor said Drainage District No. 2 of Dakota county, Nebraska, nor said so-called board of supervisors thereof ever agreed upon a location or route for said proposed ditch over or across any of said lands mentioned in the petition, nor did said so-called board of supervisors or said Drainage District Number 2 ever agree or attempt to agree with the plaintiffs or any of them, the owners of the property described in the petition, as to the acquisition of the proposed right of way over the same, nor were they or either of them ever *un*able to agree with the plaintiffs or with any of them, owners of said property described in the petition as to the acquisition of a right of way over or across said lands or any part thereof, nor were the necessary preliminary steps taken, as specified and pointed out in either of said acts, as a condition precedent to the right to enter upon, condemn or take said property of the
27 plaintiffs or any of them described in the petition.

Wherefore the plaintiffs urge and renew the prayer contained in their said petition.

And afterwards, on the 26th day of May, 1911, there was filed in the office of said Clerk a Request for Specific Findings in the words and figures following, to-wit:

"In the District Court of Dakota County, Nebraska.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, and ELIZABETH LEAHY, Plaintiffs,

vs.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants.

*Request for Specific Findings.*

The defendants request the Court to find especially as to the following issues of fact and issues of law, to-wit:

1. Do the waters of the Missouri River and those of Jackson Lake or Cut Off Lake at ordinary stages of high water commingle and flow to and from one to the other, and has this condition existed ever since Jackson Lake came into existence?

2. Is the object of said Drainage wholly private, or in the exclusive pecuniary interest of the incorporators?

3. Is the plan proposed by said District an economical safe and proper plan for reclaiming said District from the waters of Elk Creek?

4. Is the Act under which the proceedings for the organization of said Drainage District No. 2 were had unconstitutional?

28 5. Had the District Court of Dakota County, Nebraska, jurisdiction and authority to make the order declaring said Drainage District No. 2 of Dakota County, Nebraska, a corporation?

6. Is the object of said Drainage District clearly within the purposes provided in the law under which the District was organized?

7. Was said Drainage District No. 2 of Dakota County, Nebraska, organized in accordance with the provisions of the laws of the State of Nebraska?

8. Were the defendants duly and regularly elected or appointed as the supervisors of said Drainage District No. 2 of Dakota County, Nebraska?

9. Did they qualify as such supervisors, and are they now the proper officers of said Drainage District?

10. Has said Drainage District No. 2 a legal right in case of a failure to agree with the owners as to the compensation therefor, to condemn a right of way across the premises of the plaintiffs?

11. Does the application or petition for the appointment of appraisers, filed with the County Judge of Dakota County, Nebraska, comply with the laws?

12. Is it necessary to secure by a condemnation proceeding all the right of way needed in one proceeding?

13. Is a failure to make parties, all the persons interested in each and every particular tract of land needed or required for the proposed improvement a jurisdictional defect?

14. Have the plaintiffs the right in this action to raise or litigate any of the questions presented by interrogations 1, 2, 3, 4, 5, 6, 7, 8, or 9?

A. C. STRONG AND
R. E. EVANS,
*Att'ys for Defendants."*

29 On April 24, 1911, the trial of said cause was commenced in the District Court of Dakota County, Nebraska, to the court, and was continued thereafter from day to day until April 26, 1911, when the evidence being closed the case was taken and held under advisement by said court until February 12, 1912, when said court made and entered the following findings and judgment therein, to-wit:

"Now on this 12th day of February, A. D. 1912, it being the first day of the regular February A. D. 1912, term of this Court, this cause coming on to be heard upon the defendants' motion to dissolve the temporary injunction heretofore granted and upon the evidence submitted by the respective parties on the case in chief, it having been heretofore agreed between the parties in open Court that the motion to dissolve the injunction and the case on its merits should be decided at the same time and upon the same evidence, and the evidence having been submitted to this Court at a previous day and term and by the Court taken under advisement, and the Court being fully advised in the premises doth sustain said motion and said injunction is hereby vacated, dissolved and set aside except as to the land owned by the plaintiff Elizabeth Leahy, to-wit: The South East Quarter of the South East Quarter of Section 25, Township 29, Range 7 East of the 6th Principal Meridian in said County of Dakota, and as to said land and said plaintiff said motion is overruled, to which ruling and order of the Court, the plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, each separately excepts. And now on said day this cause coming on further to be heard upon the petition of the plaintiffs, the answer of the defendants, and the reply of the plaintiffs, the evidence and the arguments, oral and written, of the attorneys for the respective parties, the same having been heretofore submitted to the Court thereon, and by the Court taken under advisement, the plaintiffs being represented by Allen & Dowling and M. D. Tyler, and the defendants by
30 A. C. Strong and R. E. Evans, and the Court having fully considered the same and being duly advised in the premises doth find upon the issues joined generally in favor of the defendants and against the plaintiffs, except as hereinafter expressly found in favor of the plaintiff, Elizabeth Leahy, to which findings the plaintiffs each separately except.

The Court further finds specially as follows:

1. That Drainage District Number Two (2) of Dakota County, Nebraska, was duly and legally organized in accordance with the provisions of the Laws of the State of Nebraska; that the defendants were all duly and regularly elected or appointed as the Supervisors of said Drainage District, Number Two (2) of Dakota County, Nebraska, and qualified as such officers, and were and are the duly elected, qualified and acting supervisors of said Drainage District Number Two (2) of Dakota County, Nebraska.

2. The Court finds that said Drainage District Number Two (2) was duly and regularly organized under and by virtue of and in accordance with the provisions of Chapter 161 of the Laws of Nebraska for the year 1905 as amended by Chapter 147 of the laws of Nebraska for the year 1909, and that said Drainage District was

duly declared, adjudged and decreed a public corporation of the State of Nebraska under said laws by the District Court of Dakota County, Nebraska, at the September A. D. 1909 term of said Court, after due service of notice of the pendency of said action and proceeding to all interested parties as by the law required, and that certified copies of the files, proceedings, records and decree or judgment of the organization of said corporation were duly filed in the office of the Secretary of State of Nebraska, and in the
31 office of the County Clerk of Dakota County, Nebraska, as by law required, and that all the real estate included in said District or affected by the ditches provided for by said District were wholly within said County of Dakota.

3. The Court finds that said Drainage District Number Two (2) of Dakota County, Nebraska, employed competent civil engineers to make and who made a typographical survey of said District with maps and profiles and a full and complete plan for draining, reclaiming and protecting the lands in said District from the overflow or damage by flood, together with all physical characteristics, the right of way, road bed, together with all bridges, highways, ditches, levies, railways and each and all improvements of every kind, together with an assessment of benefits to be derived from said proposed improvement, which report having been duly presented to said Board of Supervisors, and by them considered and after certain amendments thereto, was duly and regularly approved, adopted and confirmed as the method by which the lands within the said Drainage District could be drained, re-claimed and protected from overflow from water or flood, and that said report so made, adopted and confirmed, provided for a ditch similar in character to that described by the plaintiffs in the petition, commencing at a point in the South West Quarter of the North West Quarter of Section Thirty-five (35) Township Twenty-nine (29) Range Seven (7) near where Honey Creek flows into said Elk Creek, said ditch flowing in an easterly direction parallel with the said Chicago, Burlington and Quincy Railroad to or near the east line of Section Thirty-five (35) Township Twenty-nine (29) Range Seven (7) thence in a northeasterly direction to near where the north line of the South West Quarter of the South West Quarter of Section Twenty-eight (28) Township Twenty-nine (29) Range Eight (8) intersects the south bank of what is known as Jackson Lake.
32 That the said route and said ditch so adopted by said board is the most feasable, the most economical and the safest and best method of taking care of the waters of said Elk Creek, referred to in plaintiff's petition and the defendant's answer.

4. The Court finds that said description of said proposed ditch taken with the said plats, profiles and maps of said survey as offered and shown in evidence constituted a definite and accurate description of a proper right of way, through the lands of the plaintiffs and other persons, of the said Drainage District Number Two (2) of Dakota County, Nebraska.

5. The Court further finds that after having adopted, approved and confirmed said plan of Drainage, and the course and dimensions of said ditch, and after having failed to agree with the plaintiffs,

Henry W. O'Neill and Cornelius K. Heffernan and other persons, owners of lands through which said ditch was proposed to be constructed, as to the price or value of said right of way and damages by reason of the construction and maintenance of said ditch in that behalf, that the defendants as said Board of Supervisors duly and regularly, by petition and in the form provided by law, applied to the County Judge of Dakota County, Nebraska, for the appointment of a Board of Appraisers to appraise the value of the right of way and damage to be occasioned by the construction and maintenance of the proposed ditch, and that thereupon a Board of Appraisers was duly appointed and qualified and entered upon the duties of their office as such Board of Appraisers, and viewed said premises including those of the plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, and fixed the value of such right of way and the damage to each of said plaintiffs and their said tracts of land by reason of the taking of the said right of way and of the construction and maintenance of said ditch and duly and regularly made report thereof, which report was filed in the office of the County Judge of
33 Dakota County, Nebraska, on and about the 17th day of September, 1910, all of said proceedings in reference to said appraisement having been had in accordance with the laws of the State of Nebraska, the said sums as fixed by said report and the respective tracts owned by said plaintiffs being as follows, to-wit:

"For said right of way over and across the North East Quarter of the North West Quarter of Section Thirty-six (36) Township Twenty-nine (29) North, Range Seven (7) owned by Cornelius K. Heffernan, the sum of Five Hundred Sixty and No/100 ($560.00) Dollars; for said right of way over and across the North West Quarter of the North East Quarter of Section Thirty-six (36) Township Twenty-nine (29) North, Range Seven (7), owned by Cornelius K. Heffernan, the sum of Three Thousand Two Hundred Eighty-three and No/100 ($3,283.00) Dollars:

For said right of way over and across Lot Four (4) or the South East Quarter of the South East Quarter Section Twenty-nine (29) Township Twenty-nine (29) Range Eight (8) owned by Henry W. O'Neill, the sum of Three Thousand Two Hundred Sixty and No/100 ($3,260.00) Dollars; For the said right of way over and across the South West Quarter of the South West Quarter of Section Twenty-eight (28) Township Twenty-nine (29) Range Eight (8), owned by Henry W. O'Neill, the sum of Six Hundred Nineteen and 13/100 ($619.13) Dollars; For said right of way over and across Lot Five (5) or the North West Quarter of the South West Quarter of Section Twenty-eight (28) Township Twenty-nine (29) North, Range Eight (8), owned by Henry W. O'Neill or Mary Agnes Swift, the sum of One Hundred ($100.00) Dollars."

"For said right of way over and across the South East Quarter of the South East Quarter of Section Thirty-five (35) Township Twenty-nine (29) Range Seven (7), owned by Elizabeth Leahy, the sum of Nine Hundred and No/100 ($900.00) Dollars."

34 6. The Court further finds that neither of the said plaintiffs have appealed from said appraisement, and except as to

the plaintiff, Elizabeth Leahy, the same is now a valid and subsisting award fixing the value of said right of way and the damage of each and all of said plaintiffs except the said Elizabeth Leahy, for the construction and maintenance of said proposed ditch.

7. The Court finds that as to the plaintiff, Elizabeth Leahy, no proper and sufficient offer of compromise or settlement was ever offered or made to her, and that as to the land of Elizabeth Leahy, to-wit: The South East Quarter of the South East Quarter of Section Twenty-five (25) Township Twenty-nine (29) Range Seven (7), the appraisers were without authority and their acts as to her rights and property are void and of no effect.

8. The Court further finds that the out-let of the proposed ditch in Jackson or Cut-Off Lake, was formerly the channel of the Missouri River at a low stage, and that except at especially low stages of water in the Missouri River there has been a continuous channel conveying running water from and to said lake and river, and that at a high stage of water in said Missouri River the waters flow into said lake at the north and west end thereof and through said lake and back into said river at the south or east through an out-let or shute; that the lands between the said lakes and river is made land of sand-bar through which water percolates at low stage and is overflowed at high stage of the river.

9. That by way of said Jackson or Cut-Off Lake there is a sufficient, adequate and direct out-let for the said water of Elk Creek into the Missouri River without overflowing or submerging the lands of either or any of the plaintiffs.

10. That the officers of the said Drainage District have acted entirely for the corporation, Drainage District Number Two (2) of Dakota County, Nebraska, and their purpose was only to carry out the object or purpose for which said Drainage District was organized.

11. That said Drainage District Number Two (2) has a legal right, in case of failure to agree with owners, as to right of way for a ditch properly located, to condemn such right of way across the premises of such owners.

12. That the application or the petition for the appointment of appraisers filed with the County Judge of Dakota County, Nebraska, by the defendants for the benefit and on behalf of said Drainage District Number Two (2) of Dakota County, Nebraska, complied with the requirements of the Laws of the State of Nebraska; that the defendants have the right to secure any needed right of way by condemnation proceedings duly and properly instituted, although such parties who are owners thereof were omitted from such previous condemnation proceedings.

13. That the defendants never attempted to enter or claim the right to enter upon the lands of the plaintiffs or either of them, until the awards of the Board of Appraisers should have been paid to the County Judge of Dakota County, Nebraska, but that when such awards shall have been paid to and deposited with the said County Judge of Dakota County, Nebraska, for the benefit of the respective parties, the defendants will be entitled to enter upon the lands of the

said parties, Henry W. O'Neill and Cornelius K. Heffernan, but not on the lands of the plaintiff, Elizabeth Leahy, to each and all of which findings of fact and conclusions of law the plaintiffs each separately except.

14. That the parties hereto waive other and special findings of fact or conclusion of law.

15. It is therefore considered, adjudged and decreed by the court that, when the defendants shall have paid said County Judge or secured proper acquittance from the plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, the amounts fixed by the awards made by said Board of Appraisers as due to said plaintiffs, Henry W.
36 O'Neill and Cornelius K. Heffernan, respectively, that the temporary injunction heretofore allowed and issued be and the same hereby is dissolved and this action dismissed; that as to the plaintiff, Elizabeth Leahy, said injunction shall be and remain in full force until the value of the right of way and her damages by reason of the location and construction of said ditch, which shall have been agreed upon and paid, or shall have been regularly appraised according to law and paid, the said injunction is held in force and intact against each and all defendants and their successors in office, and the costs of this action taxed to plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, except costs made by Plf. Elizabeth Leahy which are taxed to Defs. To each and every finding of fact, conclusion of laws and decree, the plaintiffs and each of them, severally except and are allowed 40 days from the rising of the Court to prepare and serve their Bill of Exceptions.

16. And now upon the application of the plaintiffs for the Court to fix the amount of a Supersedeas Bond to supersede the order of the Court sustaining the motion of the defendants to dissolve and vacate the temporary injunction heretofore issued in this cause and dissolving said injunction, the Court doth fix the amount of such bond at the sum of $4,800.00, and when such bond with approved sureties shall have been given and approved, it shall be the security for all the damages thereafter; and the bond heretofore given shall only cover damages under its terms suffered or occasioned prior to the approval of the latter bond. And now upon application of the plaintiffs the amount of an appeal bond under this decree is fixed at the sum of $200.00 and said bonds if properly continued and approved may be incorporated in one instrument.

GUY T. GRAVES, *Judge.*"

37 "Afterwards on February 27, 1912, there was filed in the office of the clerk of the district court of Dakota county, Nebraska, in this case, an appeal bond or undertaking, which, omitting caption and other formal parts, is in the words and figures following, to-wit:

Know all men by these presents, that we, Henry W. O'Neill and Cornelius K. Heffernan as principals and E. J. Mullally, as sureties, are held and firmly bound unto the defendants Jacob F. Leamer, John T. Daley, Fred Bartles, Glenn Armour and Charles H. Max-

well, in the penal sum of Five Thousand Dollars for the payment of which well and truly to be made, we hereby bind ourselves.

Dated this 27th day of February, 1912.

Whereas on the 12th day of February, 1912, a decree was rendered in the District Court of Dakota County, Nebraska, in favor of said defendants, Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, and against the plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, dismissing said case and dissolving the temporary order of injunction heretofore issued in this case as to them the said Henry W. O'Neill and Cornelius K. Heffernan, and in favor of the plaintiff, Elizabeth Leahy, and making said injunction perpetual as to her the said Elizabeth Leahy, in an action pending in said Court wherein the said Henry W. O'Neill, Cornelius K. Heffernan and Elizabeth Leahy were plaintiffs and the said Jacob F. Leamer, John T. Daley, Fred Bartels, Gleen Armour and Charles H. Maxwell were defendants, and the said Henry W. O'Neill and Cornelius K. Heffernan intend to appeal said case to the Supreme Court, and whereas the District Court has prescribed the sum of Four Thousand Eight Hundred Dollars as the amount of the bond to supersede the order and decree of the Court sustaining the motion of the defendants to dissolve and vacate the temporary injunction as to the said Henry W. O'Neill and Cornelius K. Heffernan and the sum of Two Hundred Dollars as the amount of the bond to
38 be given under Section 677 of the Code of Civil Procedure of Nebraska, and whereas the District Court has provided that both of said bonds may be incorporated in one instrument.

Now, therefore, the condition of the above obligation is such that if the said Henry W. O'Neill and Cornelius K. Heffernan shall prosecute their appeal without delay, and pay all costs which may be found against them of the final determination of the case in the Supreme Court, and shall also pay to the defendants, Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell all damages they may sustain after giving and approval of this bond, if it be finally decided that the injunction herein ought not to have been granted, then this obligation to be null and void, otherwise to be and remain in full force and effect.

HENRY W. O'NEILL.
C. K. HEFFERNAN.
E. J. MULLALLY.

I hereby approve of the execution of the above undertaking and the sufficiency of the sureties thereon, this 27th day of February, 1912.

GEO. WILKINS,
*Clerk of the District Court.*"

And thereafter, to-wit, on the 12th day of August, 1912, there was filed in the office of the said clerk of the supreme court of the state of Nebraska, a duly signed and settled Bill of Exceptions, embracing all the testimony and exceptions on the trial of said court in
39 the district court, and on January 30, 1913, there was filed in the office of said clerk of the supreme court, a printed ab-

stract of the record, in which Bill of Exceptions and printed abstract the following, among other things, appears:

R. E. Evans on behalf of the defendants, offered in evidence exhibit 1, which plaintiffs admit was filed in the office of the clerk of the district court of Dakota county, Nebraska, September 4, 1909, in its present form, has since been in his custody and is now produced by him, and which is in the words and figures following, to-wit:

"EXHIBIT 1. J. B. R.

In the District Court of Nebraska in and for Dakota County.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Petition and Articles of Association.*

1. Come now the undersigned petitioners and show to this Court that the continguous body of land hereinafter described is swamp land and overflowed land and submerged land and is such land that the owners thereof are entitled to have drained and reclaimed and protected under the provisions of the laws of the State of Nebraska in the proceedings now being instituted; that the undersigned are a majority in interest of bother the owners and the resident owners of said body of land and are desirous of having said body of land organized into a drainage district to the end that the same may be drained, reclaimed and protected, and pray that said land may be formed into a drainage district under the laws of the state of Nebraska, to-wit: Chapter 161, of the Laws of Nebraska for the year 1905, and to that end have made and signed, and herewith file, the following Articles of Association:

40 *Articles of Association of Drainage District Number (2) in Dakota County, Nebraska.*

1. The name of this organization shall be 'Drainage District Number Two (2) of Dakota County, Nebraska.'

2. The object of this Organization shall be to reclaim and protect from the effects of water, either of swamp land, overflowed land or submerged land, by any of all or any portion of the methods provided or permitted by law, the land hereinafter described, and such other lands as may be included within said district in the manner provided by law and for the purpose of carrying out such purposes shall have all the powers conferred or permitted under the law.

3. This organization shall continue for twenty (20) years, but may be dissolved at any time after its purpose shall have been accomplished by a majority vote of the acreage represented and within said district.

4. Said Association shall have a seal, by which its official actions shall be authenticated, and which seal shall consist of two concentric circles, between which there shall be the words: 'Drainage District

No. 2, Dakota County, Nebraska,' and in or near the center the words: 'Corporate Seal.'

5. The limits of said district shall be as follows:"

(Here follows a detailed and technical description of the land included within the proposed district, said boundary being given by the outline of government subdivisions and following that is given a detailed and technical description of each tract included within said proposed district, giving the name of the owner thereof and his residence, also all railroads and their line of railway, all country roads, with a detailed and technical description thereof, there being 105 tracts or parcels of land so described, one or more of which are owned by
41 each of the following persons: Thomas C. Baird, David Glenn Armour, Adolf Bartels, August T. Haase, Lyman L. Heikes, Fred Beerman, Sylvester B. Polly, and Elizabeth Polly, August Niggerman, Philip W. Bridenbaugh, Roy Armour, William Bartels, William Cheney, Harry E. Brown, Luther Heikes, Samuel A. Heikes, Milton Foreshoe, William W. Armour, Charles H. Maxwell, Samuel A. Bridenbaugh, the legatees of Adam J. Sides, John C. Gribble, James J. Lapsley, W. Irving Fisher, William Hunt, George Leamer, Jacob F. Leamer, Lewis H. Armbright, Barnabas Gribble, Louis Roost, John Sierk, Peter Morgan, William H. Boals, John Blessing, James M. Barry, Frank Davey, Mary F. Davey, Nellie Maloney, Ellen Maloney, Mildred Maloney and Mary Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, and Mrs. W. W. Sheahan, Cornelius Deloughery, John Boler, Mary Ahren, Michael Boler, Mary E. Mullally, Margaret A. McCormick, Pacific Townsite Company, Dennis Hogan, Mrs. Mary Sullivan, Michael Quinn, Christ E. Severson, Michael Heffernan, Horace Hugan, John Murray deceased (Mary Murray, widow, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray minor), James Harty, Sarah E. Erlach, Stephen P. Leis, John Cullen and Joseph Cullen, John Flannery, John T. Daley, Dillon J. McDonald, Michael J. Maloney, Ellen Maloney, widow, and James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney and Nellie Maloney, minors, Mary McGee, Thomas Hartnett, Jr., John Hartnett, James Sullivan, Jr., Joseph W. Gray, Ellen A. Hartnett, John Maloney, John P. Beacom, James E. Beacom, Frederick Bartels, Honora Howard, and John P. Howard, George W. Beacom, Benjamin N. Bridenbaugh, Woods M. Hileman, Mary Harty, Henry Bartels, Robert O. Hileman, J. Williams Bridenbaugh, Henry Ostmeyer, William Ostmeyer, Julius Lischke, William Ebel, Mary E. Armour, Robert L. Lapsley, Albert Arnold Roost, Henry Bierman, John M. Davey, Margaret Heeney, Edith Bridenbaugh, John F. Cain, Herman Roost and Henry Ebel, "The heirs at law of Jacob A. Sides, deceased," being Adam O.
42 Sides, Mabel E. Brown, Guy G. Sides, Jacob A. Sides, and Alice E. Sides his widow, Charles Bryant, "The heirs at law of John Heffernan, deceased," being Katie A. Denuce, Lizzie Field, Alice B. Heffernan, Thomas E. Heffernan, John Heffernan, Joseph W. Heffernan and Mabel Heffernan, John W. Ryan, Ellen Barry, Mary A. McGonigle, Catherine Van Hoven, John Flannery, Jr., John Ryan.)

We the undersigned owners of real estate so forming said district for said purposes are willing and obligate themselves to pay the tax or taxes, assessments, which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drainage of said lands so formed into a district as provided by law:

Charles H. Maxwell, John T. Daley, Daniel Hartnett, Adolph Bartels, Thomas Sullivan, Fred Bartels, Woods M. Hileman, Julius Lischke, A. O. Sides, Glen Armour, Henry Ostmeyer, Henry Bartels, Harry E. Brown, I. W. Fisher, William Bartels, Roy Armour, John Hartnett, Mary McGee, Thomas E. Heffernan, adm., J. W. Ryan, John Maloney, Mrs. W. Meraham, John Flannery, Mary E. Armour, Jacob F. Leamer, Chas. H. Bryant, Mabel E. Brown, Sarah E. Erlach, Matilda Sides, Margaret Heeney, Mary E. Harty, Ella B. Maloney, James M. Barry, Mrs. Catherine J. Van Hoven Splare, Frank Davey, Mary F. Davey, Mary Sullivan, E. A. Hartnett, Dillon J. McDonald, John Ryan, Thos. J. Hartnett, J. W. Gray, Thomas C. Baird, J. W. Squire, S. P. Leis, John S. Leis, Horace Dugan, Cornelius Deloughrey, Mrs. J. W. Ryan, Mrs. T. M. Cullen, J. M. Davey, C. E. Severson, William Ostmeyer, John F. Cain by A. F. Cain, Mabel E. Brown, Guy G. Sides, Hanora Horard, each of whom was described as an owner of one or more tracts included within the proposed district and described in the application or petition.

43 Mr. Allen for the plaintiffs objected to the introduction and receipt in evidence of said exhibit 1 on the following grounds:

"First. The said Exhibit is insufficient in that it fails to state that the so-called petitioners are a majority in interest of the resident owners in the land described therein or that the lands therein described are a contiguous body of swamp or over-flowed lands in this state.

Second. It is not stated in said petition or exhibit or aver-ed therein, Exhibit 1, which should be, that the proposed drainage district is for the purpose of having such lands described therein, reclaimed and protected from the effects of water by drainage or otherwise.

Third. It doesn't appear upon the face of Exhibit No. 1 that the persons who signed the same were at the time it was filed by the officer of the clerk of the District Court of Dakota County, Nebraska, September 4th, 1909, a majority in interest of the resident owners in the territory sought to be embraced in the so-called drainage district and in that respect the Exhibit is not competent evidence and doesn't prove that fact.

Fourth. That said Exhibit No. 1, or petition which it is called, doesn't contain the names and places of residence of the owners of the land sought to be embraced in said district as required by law.

Fifth. Said Exhibit No. 1, or petition, doesn't contain the description of the several tracts or parcels of land in said proposed district owned by such persons as did not join in the petition nor does it contain a proper averment or statement that such persons will be benefited by the creation of such district nor does it set out and de-

scribe such owners of real estate as are unknown as required by the statute.

Sixth. The said Exhibit 1, or articles—said Exhibit 1,
44 or petition offered in evidence doesn't contain any provision or article of rights of said proposed drainage district No. 2 to enter upon or condemn the lands of any person or persons, corporation or associations for drainage or other purposes and particularly contains no provision to that effect authorizing such condemnation of lands lying outside of and beyond the jurisdiction of said proposed drainage district.

Seventh. The said Exhibit 1, or petition, is in no manner sworn to or verified as required by law nor is it shown that the names of the persons signed thereto or proporting to be signed thereto are the genuine names of the persons whose names they proport to be nor are there any witnesses of that fact nor has any preliminary proof necessary to lay the proper foundation for the admission of such evidence been made.

Eighth. Because under Section 1, Article 11-B of the Constitution of Nebraska the so-called Drainage District No. 2 could not be organized by any special act of the Legislature and because under the Constitution of the State of Nebraska all laws shall be uniform and the Legislature have no power to make any special—to designate a special method for the organization of so-called Drainage District corporations as distinguished from the method employed in the organization of other corporations for pecuniary gain or profit.

Ninth. Because said Exhibit, or petition, is incompetent, immaterial, irrelevant and the proper foundation for its introduction has not been laid."

Which objections were overruled and the exhibit was received and read in evidence, to which rulings the plaintiffs excepted.

45 Mr. Evans on behalf of the defendants offered in evidence exhibit 2 which plaintiffs admit was filed in the office of the clerk of the district court of Dakota County, Nebraska in this case, September 4, 1909, in its present form, and which is in the words and figures following, to-wit:

"In the District Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Affidavit for Service on Non-residents.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

Woods M. Hileman being first duly sworn on oath deposes and says, that he with a majority in interest of the owners and also of the resident owner- of the real estate within the boundaries hereinafter set forth, filed in the District Court of Dakota County, Nebraska, on the 4th day of September, A. D. 1909, their petition and Articles of Association, the object, prayer, and purpose of which

was to organize a drainage district to the end that the lands in said district may be drained, reclaimed, and protected, to be known as Drainage District Number Two (2) of Dakota County, Nebraska, the limits of said district to be as follows: (here follows the description of the district by technical boundary as given in exhibit 1), said district to exist for twenty years unless sooner dissolved and to have all the powers conferred or permitted under the law. That William W. Armour, William Hunt, William H. Boals, Robert L. Lapsley, J. Williams Bridenbaugh, and Edith Bridenbaugh are each and all non-residents and service of summons cannot be made upon them, or either of then within said State of Nebraska. That William Hunt is the owner of (here follows the land described in exhibit 1 as owned by said William Hunt), all of — said lands
are within said proposed drainage district and will be bene-
46 fited thereby. The said Robert L. Lapsley is the owner of (here follows the land described in exhibit 1 as owned by said Robert L. Lapsley), all of said lands being within the said proposed drainage district and will be benefited thereby. That said William H. Boals is the owner of (here follows the land described in exhibit 1 as owned by said William H. Boals), all of said land * * * being in said drainage district and will be benefited thereby; that William W. Armour is the owner of (here follows the land described in exhibit 1 as owned by said William W. Armour), all of said land being within the proposed drainage district and will be benefited thereby; that J. Williams Bridenbaugh is the owner of (here follows the land described in exhibit 1 as owned by said J. Williams Bridenbaugh), all of said land being within the proposed drainage district and will be benefited thereby; and the said Edith Bridenbaugh is the owner of (here follows the land described in exhibit 1 as owned by said Edith Bridenbaugh), all of said land being in said proposed drainage district and will be benefited thereby. Wherefore the petitioners for the organization of said proposed drainage district pray for personal service upon said non-residents and each of them out of the state.

WOODS M. HILEMAN.

Sworn to before me and in my presence subscribed by the said Woods M. Hileman this 4th day of September A. D., 1909.

[SEAL.] GEORGE WILKINS,
*Clerk of Dist. Court.*

Mr. Allen for the plaintiffs objected to the introduction and receipt in evidence of said exhibit 2 on the following grounds:
Because said affidavit does not comply with section 78 of
47 *78 of* the Code; (2) because the jurat is insufficient; (3) for all the reasons severally and collectively made to the introduction of exhibit 1 and as incompetent, irrelevant and immaterial and no proper foundation laid: which said objections were overruled by the court and said exhibit was received and read in evidence to all of which the plaintiffs excepted.

Mr. Evans on behalf of the defendants, offered in evidence ex-

hibit 3, which was filed in the office of the clerk of the district court of Dakota county in this case, September 27, 1909, and which is in five parts. Part one is in the words and figures following, to-wit:

"EXHIBIT 3, J. B. R.

*Summons.*

District Court.

THE STATE OF NEBRASKA,
*County of Dakota, ss:*

The State of Nebraska to the Sheriff of — County, Greetings:

You are hereby commanded to Notify William Hunt, et al., defendants, that they have been sued by Thomas C. Baird, David Glenn Armour, Adolph Bartles, Roy Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James B. Barry, Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Seversen, Horace Duggan, Sarah E. Erlach, Stephen P. Leis, John S. Leis, John Flannery, John T. Daley, Dillon J. McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Hanora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, William Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry, John F. Cain, Catherine
48 Van Hoven, Charles Bryant, John Ryan, and Thomas Hartnett, Administrator of John Hartnett, deceased, plaintiffs, in the District Court of the Eighth Judicial District in and for said County of Dakota, and that unless they answer on or before the 4th day of October A. D., 1909, the Petition and Articles of Association for a Drainage District, to be known as Drainage District Number Two (2) of Dakota County, Nebraska, of said Thomas C. Baird, David Glenn Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James M. Barry, Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Severson, Horace Duggan, Sarah E. Erlach, Stephen P. Leis, John S. Leis, John Flannery, John T. Daley, Dillon J. McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Hanora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, William Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry, John F. Cain, Catherine Van Hoven, Charles Bryant, John Ryan, and Thomas Hartnett, Administrator of John Hartnett, deceased, filed against them in the

Clerk's Office of said Court, such Petition and Articles of Association will be taken as true, and judgment rendered accordingly and said Drainage District established, for the purpose of draining and reclaiming the same, and to be known as Drainage District Number Two (2), of Dakota County, Nebraska, and to continue Twenty (20) years. That William H. Hunt, is owner of the northwest quarter of the northeast quarter of section Fifteen (15) and the north half of that part of the northwest quarter of the southeast quarter of section Nine (9) lying north of the railroad track, all of said lands being in Township Twenty-eight (28), Range Eight (8), being in said Drainage District, which will be benefited thereby and
49 will be rendered liable to taxation, or assessment, for the purposes of draining said District. You will make due return to this summons on or before the 27th day of September A. D., 1909.

Witness my hand and deal of said Court at Dakota City, this 4th day of September A. D. 1909.

[SEAL.] GEORGE WILKINS,
*Clerk of District Court.*

There is endorsed thereon as a part thereof, the following:

STATE OF NORTH DAKOTA,
*County of McLean, ss:*

John A. Beck, being first duly sworn on oath deposes and says that on the 23rd day of September A. D., 1909, he served the within Writ of Summons and Notice on the within named William Hunt, by delivering to him personally a true and certified copy of said Writ with all the endorsements thereon.

JOHN A. BECK.

Sworn to before me and in my presence subscribed this 23rd day of September A. D. 1909.

O. S. HJELLE,
*Notary Public, McLean County, No. Dak.*

My Commission expires March 20, 1914.

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby appoint John A. Beck my deputy for me and in my stead to serve the within summons and notice on the within named William Hunt.

Dated this 4th day of September A. D., 1909.

J. P. ROCKWELL,
*Sheriff of Dakota County, Nebraska.*

50 STATE OF NORTH DAKOTA,
*County of McLean, ss:*

I hereby certify that the within and foregoing is a true and certified copy of the original summons and notice now in my hands for service.

JOHN A. BECK,
*Special Deputy.*

Endorsed: Filed this 27 day of Sept. 1909. George Wilkins, Clerk of Dist. Court."

Part 2 is a summons in form exactly the samd ad part 1 except that it is for service on J. Williams Bridenbaugh and Edith Bridenbaugh and describes the piece of land which in Ex. 1 is described as owned by them and has the following return:

"COUNTY OF LOS ANGELES,
*State of California, ss:*

J. J. Henry, being first duly sworn on oath deposes and says that on the 14th day of September A. D., 1909, he served the within Writ of Summons and Notice on the within named J. Williams Bridenbaugh and Edith Bridenbaugh, by delivering to each personally, a true and certified copy of said Writ with all endorsements thereon.

J. J. HENRY.

Sworn to before me and in my presence subscribed this 14th day of September A. D., 1909.

C. G KEYES,
*County Clerk and ex-Officio Clerk of the Superior Court in and for the County of Los Angeles, State of California.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby appoint J. J. Henry my deputy for me and in my stead to serve the within summons and notice on the within J. Williams Bridenbaugh and Edith Bridenbaugh.
Dated this 4th day of September A. D., 1909.

J. P. ROCKWELL,
*Sheriff of Dakota County, Nebraska.*

51 COUNTY OF LOS ANGELES,
*State of California, ss:*

I hereby certify that the within and foregoing is a true and certified copy of the original summons and notice now in my hands for service.

J. J. HENRY,
*Special Deputy."*

Part 3 is a summons in form exactly the same as part 1 except that it is for service on Robert L. Lapsley and describes the piece of land which is described in Ex. 1 as owned by Robert L. Lapsley and has the following return.

"COUNTY OF SANTA CLARA,
*State of California, ss:*

Arthur B. Langford, being first duly sworn on oath deposes and says that on the 22nd day of September A. D. 1909, he served the within writ of summons and notice on the within named Robert L. Lapsley by delivering to him personally a true and certified copy of said writ with all endorsements thereon.

ARTHUR B. LANGFORD.

Sworn to before me and in my presence subscribed this 23rd day of September A. D., 1909.

HENRY A. PFISTER,
By WENT AGGELER, *Deputy.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby appoint Arthur B. Langford my deputy for me and in my stead to serve the within summons on the within named Robert L. Lapsley.

Dated this 4th day of September, A. D. 1907.

J. P. ROCKWELL,
*Sheriff of Dakota County, Nebraska.*

52 COUNTY OF LOS ANGELES,
*State of Oregon, ss:*

I hereby certify that the within and foregoing is a true and certified copy of the original summons and notice now in my hands for service.

ARTHUR B. LANGFORD,
*Special Deputy.*

Endorsed: J. P. Rockwell, Sheriff. Filed this 27 day of Sept. 1909. George Wilkins, Clerk of Dist. Court."

Part 4 is a summons in form exactly the same as part 1 except that it is for service on William H. Boals and describes the tract of land which is described in Ex. 1 as owned by William H. Boals and has the following return:

"COUNTY OF POLK,
*State of Oregon, ss:*

J. M. Grant, being first duly sworn on oath deposes and says that on the 11th day of September A. D., 1909, he served the within Writ of Summons and Notice on the within named William H. Boals, by

delivering to him personally, a true and certified copy of said Writ with all endorsements thereon.

J. M. GRANT.

Sworn to before me and in my presence subscribed this 11th day of September A. D., 1909.

HORT C. EAKIN,
*Notary Public for Oregon.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby appoint J. M. Grant my deputy for me and in my stead to serve the within summons and notice on the within named William H. Boals.

Dated this 4th day of September A. D., 1909.

J. P. ROCKWELL,
*Sheriff of Dakota County, Nebraska.*

53 COUNTY OF POLK,
*State of Oregon, ss:*

I hereby certify that the within and foregoing is a true and certified copy of the original summons and notice now in my hands for service.

____ ____,
*Special Deputy.*

Endorsed: Filed this 16 Day of Sept. 1909. George Wilkins, Clerk District Court."

Part 5 is a summons in form exactly the same as part 1 except that it is for service on William W. Armour and describes the tract of land which is described in Ex. 1 as owned by William W. Armour, and has the following return:

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby certify that on the 16 day of Sept., 1909, I served the within writ of Summons on the within named William W. Armour, by leaving a true and certified copy of said writ at his residence in Sioux City, Iowa, as required by law.

J. P. ROCKWELL, *Sheriff.*

Fees:

| | |
|---|---|
| Service and Return..... | $.25 |
| Copy & Mileage..... | .85 |
| Total ..... | $1.10 |

Endorsed: Filed this 27 day of Sept. 1909. George Wilkins, Clerk District Court. 22

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Mr. Allen for the plaintiffs objected to the introduction of each of the so-called summons, (1) because the so-called summons to J. William Bridenbaugh and Edith Bridenbaugh does not conform to the statute; (2) because it does not give any length of time for return thereof or for said parties to appear and answer; (3) because said summons purports to have been served in Los Angeles county, California, on September 14, 1909, which was an insufficient time under the statute to permit said parties to appeal and answer on September 27, 1909; (4) because the authority of said J. J. Henry to serve the same is not endorsed on the return; (5) because the return fails to show that service of summons was made personally
54 upon each of said persons in a designated place; (6) because same is irrelevant, immaterial, and the same objections were repeated as to the alleged summons upon William Hunt and were also repeated as to the alleged summons on Robert L. Lapsley and also repeated as to William H. Boals and to William W. Armour and the plaintiffs further objected to each part of exhibit 3 because the district court of Dakota County had no jurisdiction of the person or estate of any of said parties, and because the same is incompetent, immaterial, irrelevant and no foundation laid. It was admitted by the plaintiffs that the various instruments embodied in exhibit 3 were issued at the time and returned and filed on the date there shown.

Which objections were overruled by the court and the exhibit received and read in evidence, to which rulings the plaintiffs excepted.

Mr. Evans on behalf of the defendants, offered in evidence exhibits 4, 5, 6, and 7, which were filed respectively in the office of the clerk of the district court of Dakota county, Nebraska, October 20, 1909, October 1, 1909, and October 18, 1909, and which are in the words and figures following, to-wit:

"Ex. 4, J. B. R.

In the District Court of Nebraska within and for Dakota County.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Consent to Formation of District.*

Comes now John F. Heffernan, Alice Heffernan, Joseph W. Heffernan, owners of the following described real estate, to-wit:—that part of the east half of the southeast quarter of section
55 seventeen (17) township twenty-eight (28) range eight (8) described as follows:—Commencing at the southeast corner of the southeast quarter of said section secenteen (17), thence running west eighty rods, thence north seventy-one rods, thence east eighty rods, thence south seventy-one rods to the place of beginning, hereby join in the petition and articles of association filed in this court praying for the formation of said Drainage District No. 2 and

agree to the inclusion therein of the above described lands within the lines of said proposed district and agree to pay all taxes and assessments that may be assessed against them to pay the expenses of making said improvement necessary to effect the drainage of said lands so formed into said district according to law.

JOHN F. HEFFERNAN,
ALICE HEFFERNAN,
JOSEPH W. HEFFERNAN.

STATE OF NEBRASKA,
*County of Dakota, ss:*

On this — day of October A. D. 1909, before me the subscriber personally appeared the above named —— ——, to *be* known to be the persons described in and who signed the foregoing instrument and acknowledged the same to — their voluntary act and deed.

In *s*itness whereof I have hereunto set my hand this — *say do* October, A. *E.* 1909.

—— ——.

Endorsed: Filed this 20 day of Oct., 1909. George Wilkins, Clerk of Dist. Court.

56 Ex. 5, J. B. R.

In the District Court of Nebraska within and for the County — Dakota.

IN THE MATTER OF THE ORGAN*O*ZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Consent to Formation of District.*

Comes now Joseph Cullen and John Cullen, parties to the above entitled proceeding and owners of the real estate described in paragraph numbered 66 in the petition and articles of association filed herein and being part of the south half of the northwest quarter of section thirty-five (35), township twenty-nine (29) north, of range seven (7) east, and hereby join in the petition for the formation of said drainage district and agree to the inclusion of the lands owned by us in said district so far as they are within the lines of said district as in said petition and articles set forth; we also agree to pay all taxes and assessments that may be assessed against them to pay the expenses of making said improvements necessary to effect the drainage of said lands so formed into a district as provided by law.

Dated this 30th day of Sept. A. D. 1909.

JOHN CULLEN.
JOSEPH CULLEN.

STATE OF NEBRASKA,
*County of Dakota, ss:*

Before me the subscriber a notary public in and for said county personally appeared John Cullen and Joseph Cullen, to me personally known to be the persons described in and who signed the foregoing instrument and acknowledge the same to be their voluntary act and deed.

ED. T. KEARNEY,
*Notary Public.*

Sworn to before me and in my presence subscribed this 30th day of Sept. A. D., 1909.
[SEAL.]

ED. T. KEARNEY,
*Notary Public.*

57 Endorsed: Filed this 1 day of Oct., 1909. Ge-rge Wilkins, Clerk Dist. Court.

Ex. 6, J. B. R.

In the District Court of the County of Dakota, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Consent to Formation of District.*

Comes no- Sylvester B. Polly and Elizabeth A. Polly, of Butte, Nebraska, and owners of the southwest quarter of the northwest quarter of section twenty-seven (27) Township twenty-eight (28) north, of range eight (8) east in Dakota County, Nebraska, and hereby join in the petition filed in this court praying for the formation of said drainage district and agree to the inclusion of the land owned by us within the lined of said proposed district the same being between twenty and twenty-five acres; we agree also to pay all taxes and assessments that may be assessed against them to pay the expenses of making said improvements necessary to effect the drainage of said lands so formed into said district according to law.

Dated this 4th day of October A. D., 1909.

SYLVESTER B. POLLY.
ELIZABETH A. POLLY.

STATE OF NEBRASKA,
*County of Boyd, ss:*

On this 4th day of October A. D., 1909, before me the subscriber County Judge in and for said County of Boyd personally appeared Sylvester B. Polly and Elizabeth A. Polly to me known to be the persons described in and who signed the foregoing instrument and acknowledged that the same was their voluntary act and deed for all the purposes therein set forth.

58 In witness whereof I have hereunto set my hand and affixed my notarial seal on the day and year last above written.

[SEAL.] LUCIUS LESLIE,
*County Judge.*

Endorsed: Filed this 18 day of Oct., 1909. George Wilkins, Clerk Dist. Court.

Ex. 7, J. B. R.

In the District Court of Nebraska within and for the County of Dakota.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Consent to Formation of District.*

Comes now Alice Sides and Jacob A. Sides, owners and interested in the following described real estate, to-wit: The Southwest quarter of the northeast quarter of section sixteen (16) in township twenty-eight (28) north, of range eight (8) and hereby join in the petition and articles of association filed in this court and agree to the inclusion therein of the above described land within the lines of said district and agree to pay all taxes and assessments that may be levied or assessed against them to pay the expenses of making said improvements necessary to effect said drainage of said lands so formed into said district according to law.

ALICE E. SIDES.
JACOB A. SIDES.

STATE OF NEBRASKA,
*County of Dakota, ss:*

On this 16th day of October A. D., 1909 before me the subscriber personally appeared the above named Alice Sides and Jacob A. Sides and acknowledge the signing of the above instrument to
59 be their voluntary act and deed they and each of them being personally known to me and known to be the persons who signed the said instrument.

In witness whereof I have hereunto set my hand and affixed my notarial seal on the day and year last above written.

[SEAL.] R. E. EVANS,
*Notary Public for Dakota County, Nebraska.*

My commission expires January 12, 1912.

Endorsed: Filed this 18 day of Oct. 1909. George Wilkins Clerk Dist. Court."

Mr. Allen for the plaintiffs objected to the introduction and receipt in evidence of any of said exhibits 4, 5, 6 and 7 as instruments not authorized by statute in the proceedings to organize

the drainage district and as instruments unknown to the law and no service was made on any of said parties signing said exhibits as required by the act of 1905, and because none of said exhibits was executed or on file on or before September 27, 1909. Said objections were overruled by the court and said exhibits respectively received in evidence, to all of which the plaintiffs excepted.

Mr. Evans on behalf of the defendants offered in evidence exhibit 8 consisting of a summons and the certificate of J. P. Rockwell, sheriff of the service thereof, filed in the office of the clerk of the district court of Dakota county in this case, September 27, 1909, which said instruments are in the words and figures following, to-wit:

60 Ex. 8, J. B. R.

*"Summons, District Court.*

THE STATE OF NEBRASKA,
*County of Dakota, ss:*

The State of Nebraska to the Sheriff of said County, Greetings:

You are hereby Commanded to Notify Augustus T. Haase, Lyman L. Heikes, Fred Beerman, August Niggerman, Phillip W. Bridenbaugh, William Cheney, Luther Hiekes, Samuel A. Heikes, Milton Foreshoe, Samuel A. Bridenbaugh, Alice E. Sides, Jacob A. Sides, John C. Gribble, James J. Lapsley, George Leamer, Lewis H. Armbright, Barnabas Gribble, Louis Roost, John Sierk, Peter Morgan, John Blessing, John Boler, Michael Boler, Mary Ahren, Mary E. Mullally, Margaret A. McCormick, Pacific Townsite Company, a Corporation, Dennis Hogan, Michael Quinn, Michael Heffernan, Mary Murray, Mary Murray, Maggie Murray, John Murray, Luke Murray, miners, Gustavus Murray, minor, Thomas Murray, minor, James Harty, John Cullen, Joseph Cullen, John P. Beacom, James E. Beacom, Hanora Howard, Guardian of said John P. Howard, minor, John P. Howard, George W. Beacom, Benjamin N. Bridenbaugh, Robert O. Hileman, J. Williams Bridenbaugh, William Ebel, Albert Arnold, Roost, Henry Bierman, Edith Bridenbaugh, Herman Roost, Henry Ebel, Mary A. McGonigal, Chicago, Burlington and Quincy Rail Road Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company, William W. Armour, The County of Dakota, James Maloney, minor, Joseph Maloney, minor, Mildred Maloney, minor, Mary Maloney, minor, Nellie Maloney, minor, Thomas Heffernan, John Heffernan, Joseph Heffernan, Katie A. Demree, Lizzie Fields, Alice B. Heffernan, and Mabel A. Heffernan, minor, Defendants, that they have been sued by Thomas C. Baird, David Glenn Armour, Adolph Bartels, Roy Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James M. Barry,
61 Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Severson, Horace Duggan,

Stephen P. Leis, John S. Leis, John Flannery, John T. Daley, Dillon J. McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Hanora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, William Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry, John F. Cain, Catherine Van Hoven, Charles Bryant, John Ryan, Sarah E. Erlach and Thomas Hartnett, Administrator of John Hartnett, Deceased, Plaintiffs, in the District Court of the Eighth Judicial District in and for said County of Dakota, and that unless they answer on or before the 4th day of October A. D. 1909, the Petition and Articles of Association for a Drainage District to be known as Drainage District Number Two (2), of Dakota County, Nebraska, of said Thomas C. Baird, David Glenn Armour, Adolph Bartels, Roy Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James M. Barry, Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Severson, Horace Duggan, Stephen P. Leis, John S. Leis, John Flannery, John T. Daley, Dillon J. McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Hanora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry, John F. Cain, Catherine Van Hoven, Charles Bryant, John Ryan, Sarah E. Erlach, and Thomas Hartnett, Administrator of John Hartnett, deceased, filed against them in the Clerk's office of said Court, such petition and

62 Articles of Association will be taken as true, and judgment rendered accordingly and said Drainage District established, for the purpose of draining and reclaiming the same, and to be known as Drainage District Number Two (2), of Dakota County, Nebraska, and to continue Twenty (20) years. You will make due return of this summons on or before the 27th day of September A. D., 1909.

Witness my hand and seal of said Court at Dakota City, this 4th day of September A. D., 1909.

[SEAL.] GEORGE WILKINS,
*Clerk of District Court.*

THE STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby certify that on the 14th day of September, 1909, I server a true and certified copy of the within Writ of Summons on the within named by delivering to each personally Augustus T. Haase, Lyman L. Heikes, Fred Beerman, August Niggerman, Phillip W. Bridenbaugh, William Cheney, Luther Heikes, Samuel A. Heikes, Milton Foreshoe, Samuel A. Bridenbaugh, Alice E. Sides, Jacob A. Sides, John C. Gribble, James J. Lapsley, George Leamer,

Lewis H. Armbright, Barnabas Gribble, Louis Roost, John Sierk, Peter Morgan, John Blessing, John Boler, Michael Boler, Mary Ahren, Mary E. Mullally, Margaret A. McCormick, Dennis Hogan, Michael Quin, Michael Heffernan, Mary Murray, Mary Murray, Maggie Murray, John Murray, Luke Murray, minor, Gustavus Murray, minor, Thomas Murray, minor, James E. Beacom, Hanora Howard, Guardian of said John P. Howard, minor, John P. Howard, George W. Beacom, Benjamin N. Bridenbaugh, Robert O. Hileman, William Ebel, Albert Arnold Roost, Henry Bierman, Herman
63 Roost, Henry Evel, Mary A. McGonigal, Chicago, Burlington and Quincy Rail Road Company, Chicago St. Paul, Minneapolis and Omaha Railway Company, the County of Dakota, James Maloney, William W. Armour, James Maloney, minor, Joseph Maloney, minor, Mildred Maloney, minor, Mary Maloney minor, Nellie aloney, minor, Thomas Heffernan, John Heffernan, Joseph Heffernan, Katie A. Demree, Lizzie Fields, Alice B. Heffernan, Mabel A. Heffernan, and on the Pacific Town Site Company by delivering to John McHugh, a Director, in Sioux City, Iowa, who accepted service, and on Mary Maloney, as Natural Guardian of the Heris of Michael Maloney, as required by law.

Fees.

J. P. ROCKWELL, *Sheriff.*
WM. BIERMAN, *Deputy.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby further certify that I served a true and certified copy of the within writ on the Chicago, St. Paul, Minneapolis and Omaha Railway Company, by leaving the same with George Pranger, their agent, at Dakota City, Nebraska, there being no President, Vice-President or other executive officer in said County, all done on the 14th day of September A. D., 1909, and on the Chicago, Burlington and Quincy Rail Road Company by leaving a true and certified copy of the within writ at their usual place of business, on the 14th day of September, A. D., 1909, in South Sioux City, Nebraska, there being no President, Vice-President or other executive officer in said County, and on the Pacific Townsite Company, a Corporation, by leaving a true and certified copy with John McHugh, a Director, on the 18th day od September A. D. 1909, at his usual place of
64 business, in Sioux City, Iowa, who accepted service, there being no executive officer in said Dakota County, Nebraska, as required by law.

J. P. ROCKWELL, *Sheriff.*
WM. BIERMAN,
*Deputy Sheriff.*

Fees:

| | |
|---|---|
| Service and return | $.25 |
| Mileage | 9.00 |
| Copies | 19.25 |
| Additional costs | 26.00 |
| Total | 54.50 |

Endorsed: Filed this 27 day of Sept. 1909. George Wilkins, Clerk Dist. Court."

Mr. Allen for the plaintiffs, objected to the introduction and receipt in evidence of Exhibit 8

(1) because said summons does not contain statements required in the summons issued under the laws of this state; (2) because it requires said persons to appear and answer on or before October 4, 1909, seven days after the regular September, 1909, term of court began and did not require them to appear and answer at any time before September 27, 1909, as required by statute; (3) that said summons was not made returnable at the next term of the district court nor directed to the several owners of real estate in said proposed district; (4) said summons was issued on September 4, 1909, and required the sheriff to return the same on September 27, 1909, being the first day of the regular September term; (5)
65 because said summons was insufficient to confer jurisdiction upon the district court or authority to enter the order made October 23, 1909; (6) because of irregularities in the service upon the several parties named in said summons. It was admitted by plaintiffs that Exhibit 8 was issued, returned and filed on the dates shown thereon. Objections overruled.

Mr. Evans, on behalf of the defendants, offered in evidence exhibit 9 consisting of a summons and certificate of service thereof filed in the office of the clerk of the district court of Dakota county in this case, September 27, 1909, which said instruments are in the words and figures following, to-wit:

Ex. 9, J. B. R.

*"Summons, District Court.*

THE STATE OF NEBRASKA,
*County of Dakota, ss:*

The State of Nebraska to the Sheriff of Boyd County, Greetings:

You are hereby commanded to Notify Sylvester B. Polly and Elizabeth A. Polly, et al., Defendants, that they have been sued by Thomas C. Baird, David Glenn Armour, Adolph Bartels, Roy Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James M. Barry, Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Severson, Horace Duggan, Sarah E. Erlach, Stephen P. Leis, John S. Leis, John Flannery, John T. Daley, Dillon McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Manora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, William Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry,

John F. Cain, Catherine Van Hoven, Charles Bryant, John
66 Ryan and Thomas Hartnett, Administrator of John Hartnett,
Deceased, Plaintiffs, in the District Court of the Eighth Judicial District in and for said County of Dakota, and that unless they answer on or before the 4th day of October, A. D., 1909, it being the first day of the next term of said Court, the petition and Articles of Association for a Drainage District of said Thomas C. Baird, David Glenn Armour, Adolph Bartels, Roy Armour, William Bartels, Harry E. Brown, Charles H. Maxwell, Adam O. Sides, Matilda Sides, W. Irving Fisher, Jacob F. Leamer, James M. Barry, Frank Davey, Mary F. Davey, Cornelius Deloughrey, Ellen Maloney, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Mary Sullivan, Christ E. Severson, Horace Duggan, Sarah E. Erlach, Stephen P. Leis, John S. Leis, John Flannery, John F. Daley, Dillon McDonald, Mary McGee, Thomas Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John W. Squire, Ellen A. Hartnett, John Maloney, Fred Bartels, Hanora Howard, Woods M. Hileman, Mary Harty, Henry Bartels, Henry Ostmeyer, William Ostmeyer, Julius Lischke, Mary E. Armour, John M. Davey, Margaret Heeney, Guy Sides, Mabel Brown, John W. Ryan, Ellen Barry, John F. Cain, Catherine Van Hoven, Charles Bryant, John W. Ryan and Thomas Hartnett, Administrator of John Hartnett, deceased, filed against them in the Clerk's office of said Court such petition and articles of association will be taken as true, and judgment rendered accordingly and said Drainage District established. You will make due return of this summon- on or before the 27th day of September A. D., 1909.

GEORGE WILKINS,
*Clerk of District Court.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby certify that on the 23rd day of September, 1909, I served the within Writ of Summons on the within named Sylvester B. Polly and Elizabeth A. Polly, by delivering to each of them true and certified copies of this writ with all endorsements thereon
67 in Boyd County, Nebraska, as required by law.

THOMAS COLEMAN, *Sheriff.*

Fees:

| | |
|---|---|
| Service, and return | $.75 |
| Copies | .50 |
| Mileage | 1.00 |
| Total | 2.25 |

Endorsed: Filed this 27 day of Sept. 1909 George Wilkins Clerk Dist. Court."

Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of exhibit 9 because said summons was served in Boyd county on September 23, 1909 just four days before the party was cited to appear; because the court was without jurisdic-

tion to enter any order in this case said exhibit not being filed until September 27, 1909; because the clerk had no authority to issue the same nor more than one summons because no præcipe was filed requiring the issuance of alias summonses to the sheriff of any other county and is immaterial, irrelevant and no foundation laid. It was admitted that the dates of issuance, return and filing are shown on the exhibit. Objections overruled.

Mr. Evans, on behalf of the defendants, offered in evidence exhibit 10, consisting of the answer and objections of certain persons, filed in the office of the clerk of the district court of Dakota County, which said instrument is in the words and figures following, to-wit:

68 "EXHIBIT 10, J. B. R.

In the District Court of Dakota County, Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Answer and Objections.*

Come now the undersigned and object to the organization of Drainage District Number Two (2), of Dakota County, Nebraska, as asked for by the petition and Articles of Association filed herein on the 4th day of September, 1909, and we object to the formation of said Drainage District Number Two (2), of Dakota County, Nebraska, for the following reasons:

1. That the contiguous body of land described in said petition and articles of association filed herein, does not embrace all the contiguous land similarly situated with that described in said petition as to being swamp land or overflowed or submerged land.

2. That said petition and Articles of Association *is* not signed by a majority in interest of the owners of the alleged contiguous body of swamp or overflowed lands in said county.

3. That said petition and Articles of Association *is* not signed by a majority in interest of the owners of the body of land described therein and that body of land similarly situated as to being swamp lands and overflowed lands contiguous to that portion described in said petition.

4. That many signatures to the said petition were obtained by misrepresentation and misconstruction of the drainage laws and the plans and methods to be used and results to be obtained by the organization of said drainage district and the undersigned who signed said Srticles of Association hereby withdraw their names therefrom and oppose the organization of said district.

69 5. That places of residence of the signers of said petition and Articles of Association are not given as required by law.

6. There is no allegation as to the unknown owners of lands situated within the district described.

7. There is no designation of non-resident owners of land in the said described district nor has any service of notice of the pendency of the said petition and action been made on non-resident owners as required by law.

8. The owners of land within the district described in said petition and Articles of Association are not all included within such petition and Articles.

9. It is an impossibility to drain the lands situated within the district described in the said petition and Articles of Association so that the result sought may be obtained.

10. The expense of draining the district described in said Articles will be dispropostionate to the benefits derived from the contemplated work.

11. The land owned by the undersigned in said district is largely used for the production of hay and is a good grade of land for that purpose. If said land is drained as contemplated and should such drainage be successful said land will be destroyed as hay land and will not become capable of high cultivation of other products. Should said drainage not be a success and we claim it will not be, then the said lands will be injured and perhaps destroyed for all farming purposes.

12. Many owners of land within the proposed district are wrongfully included within said district as their land is not affected by the overflow or standing of water upon their said lands.

13. That a majority in interest of the owners of the body of land described in said petition and Articles are opposed to the organization of said drainage district.

70 14. That the law under which it is sought to organize said district is unconstitutional, for the reasons following: The act for the formation of drainage districts by the district court passed in 1909, being Senate File No. 264, Chapter 147 of the Session Laws of the year 1909, of the State of Nebraska, is unconstitutional, because,

1. Its enforcement will take private property without due process of law, contrary to the Constitution of the State of Nebraska, Section III, Article 1.

2. It expressly denies a hearing in the courts of last resorts, contrary to The Constitution of the State of Nebraska, Article 1, Section XXIV, and this provision was conducive to the passage of the said act.

3. It brings into action no judicial power of the court, as distinguished from legislative.

4. Its enforcement will take private property without just compensation therefor, contrary to the Constitution of the State of Nebraska, Article 1, Section XXI.

5. It does not anywhere require a finding that it is necessary to drain the proposed lands nor that the public health, convenience or welfare will be promoted by draining the lands of the proposed district.

6. There is no express provision in said act providing for an appeal and prescribing the method of appeal from a judgment organizing said district.

All acts for the formation of drainage districts by the district court passed prior to the year 1909, are unconstitutional, because,

1. They bring into action no judicial power of the court; as distinguished from legislature.

2. They do not provide expressly for an appeal, nor provide a method for appealing, from the decision of the drainage
71 board on questions of location of drain, extent and cost of the improvement and plan for the reclamation and protection of the property in the proposed drainage district.

3. They do not anywhere require a finding that it is necessary to drain the proposed lands nor that the public health, convenience or welfare will be promoted by draining the lands of the proposed district.

4. There is no express provision in said acts providing for an appeal and prescribing the method of appeal from a judgment organizing said district.

Section 23, Article 4, Chapter 89, of the Compiled Statutes of 1909, or that part of said section providing that the drainage board may 'straighten or shorten and deepen or widen the course of any stream, or abandon the bed of any stream and construct a new channel therefor,' is unconstitutional for the reason that the drainage act of 1905, being Chapter 161 of the Session Laws of 1905, of which the above mentioned Section is a part, contains more than one subject not clearly expressed in its title, the above mentioned subject in said Section 23, not being embraced in the title of the said act, and said subject being conducive to the passage of the entire act the said entire act referred to above is void and unconstitutional.

MICHAEL BOLER.
DENNIS HOGAN.
HORACE DUGAN.
MARY McGONIGAL.
P. W. BRIDENBAUGH.
AUGUST NIGGERMANN.
HENRY OSTMEYER.
AUGUSTUS F. HAASE.
72 WILLIAM CHENEY.
JAMES J. LAPSLEY.
MATILDA SIDES.
L. H. ARMBRIGHT.
ROBERT L. LAPSLEY.
By J. J. LAPSLEY.
JULIUS LISCHKE.
I. W. FISHER.
WM. W. ARMOUR.
EMMA L. LITTLE.
JOHN BLESSING.
HENRY EBEL.
ALBERT ROOST.
W. H. BOALS,
Per B. M. BOALS.
FRED BEERMAN.
E. J. MURRAY.
LUKE MURRAY.
Mrs. MARY MURRAY, her X mark.

MARGARET McCORMICK.
G. A. BLESSING.
MICHAEL QUINN.
Mrs. MARY AHREN.
L. L. HEIKES.
D. W. HOCH.
S. A. BRIDENBAUGH.
MIKE HEFFERNAN.
SAMUEL A. HEIKES.
ADAM O. SIDES.
MILTON FORESHOE, Sr.
GEORGE LEAMER.
JACOB F. LEAMER.
F. C. GRIBBLE.
WM. EBEL.
WILL J. HUNT.
BARNABAS GRIBBLE.
HERMAN ROOST.
HENRY BIERMANN.
PETER MORGAN.
FRED BEERMAN.
GUS MURRAY.
MARY E. MULLALLY.
TOM MURRAY.

Endorsed: In Dist. Court Dakota County Nebraska. In the Matter of the Organization of Drainage District No. 2. Dakota County, Nebraska. Answer and Objections. Filed this 9 Day of Oct., 1909. George Wilkins, Clerk Dist. Court. Paul Pizey, Att'y for Objectors."

73 Mr. Evans on behalf of the defendants, offered in evidence exhibit 11, the answer of Paul Pizey, guardian ad litem, which was filed in the office of the clerk of the district court of Dakota county, October 19, 1909, and is in the words and figures following, to-wit:

"Ex. 11, J. B. R.

In District Court of Dakota County, Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA.

*Answer of Guardian Ad Litem.*

Comes now Paul Pizey, duly appointed Guardian Ad Litem in this cause for the following minor heirs, to-wit: Mabel Heffernan, John P. Howard, James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney, Nellie Maloney, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray and Thomas Murray, and objects to the organization of Drainage District No. 2, of Dakota County, Nebraska, for the following reasons, to-wit:

1. That the contiguous body of land described in said petition and articles of association filed herein, does not embrace all the contiguous land similarly situated with that described in said petition as to swamp land overflowed or submerged land.

2. That said petition and articles of association is not signed by a majority in interest of the owners of the alleged contiguous body of swamp or overflowed lands in said county.

3. That said petition and articles of association is not signed by a majority in interest of the owners of the body of land described therein and that body of land similarly situated as to being swamp lands and overflowed land contiguous to that portion described in said petition.

4. That the land of the said minors will not be benefitted by the organization of said district.

74 5. The expense of draining the said district will be disproportionate to the benefit derived so far as the lands of said minors are concerned.

6. The laws under which it is sought to organize said district is unconstitutional.

PAUL PIZEY,
*Guardian Ad Litem.*

STATE OF NEBRASKA,
*Dakota County, ss:*

Paul Pizey, being first duly sworn on oath deposes and says that he is the duly appointed Guardian Ad Litem in the above cause, for the minors heirs mentioned above; that he has read the foregoing answer and knows the facts therein set forth and the allegations of said answer are true as he verily believes.

PAUL PIZEY.

Subscribed and sworn to before me by the said Paul Pizey, this 19th day of October A. D., 1909.

[SEAL.]

GEORGE WILKINS,
*Clerk District Court.*

Endorsed: District Court, Drainage Dist. No. 2. Answer of Guardian Ad Litem. Filed this 19 Day of Oct. 1909. George Wilkins, Clerk Dist. Court."

75 Mr. Allen on behalf of the plaintiffs, objected to the introduction and receipt in evidence of said exhibit 11 because it is not shown that any of these minors were under the age of 14 years and if above 14 years it is not shown that service was made on him or upon the father or mother or person having charge or control of them or with whom the infant lived, and (2) because no service whatever in that proceeding was had on any of said minors; (3) because the district court was without jurisdiction to appoint a guardian ad litem of said minors not being in court or before the court; (4) because said guardian ad litem had no authority to appear in their behalf. But it is admitted that the signatures thereto are genuine, the dates there shown are correct, and that said exhibit is a part of the files in said matter of the drainage district. Objections overruled and exhibit 11 received.

Mr. Evans on behalf of the defendants, offered in evidence exhibit 12, entitled Re Petition, filed in the office of the clerk of the district court of Dakota county, October 18, 1909, which said instrument is in the words and figures following, to-wit:

"EXHIBIT 12, J. B. R.

In the District Court of the County of Dakota, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Re Petition.*

Comes now Jacob F. Leamer, I. W. Fisher, Adam O. Sides and Matilda Sides, persons who have heretofore signed the petition and articles of association for the formation of the proposed Drainage District No. 2, and who have since the filing of said petition and

articles signed other instrument or instruments the purpose of which was to present and represent the subscribers as opposed to the organization of said district or as not in favor thereof and hereby
76 re-affirm and repeat the petition and articles of association as filed herein and hereby against consent to and ask the formation of said district as petitioned and prayed for in said petition and articles of association.

Dated this 16th day of October, A. D. 1909.

JACOB F. LEAMER.
I. W. FISHER,
ADAM O. SIDES,
MATILDA SIDES.

STATE OF NEBRASKA,
*County of Dakota, ss:*

On this — day of October A. D., 1909, before me the subscriber a notary public personally appeared Adam O. Sides, Matilda Sides who being by me first duly sworn on oath deposes and says that *that* they signed the foregoing instrument and that it is their voluntary act and deed and that the facts therein set forth are true as they verily believe.

—— ——.

Sworn to before me and subscribed and acknowledged in my presence this — day of October A. D. 1909.

—— ——.

Endorsed: Filed this 18 day of Oct. 1909. George Wilkins, Clerk District Court."

On behalf of the plaintiffs, Mr. Allen objected to the receipt in evidence of said exhibit 12 because it is a paper unknown to law; (2) because no foundation is laid for its introduction and
77 it is incompetent, irrelevant and immaterial; (3) because it is not verified by the parties whose names are signed thereto; (4) because it is not shown upon its face or otherwise that it represents parties who own any interest whatever in any real estate embraced in the proposed district. But it is admitted that the dates are correct and it is a part of the files and the signatures thereto are genuine. Objections overruled.

Mr. Evans on behalf of the defendants, offered in evidence exhibit 13 filed in the office of the clerk of the district court of Dakota county, October 18, 1909, which said instrument is in the words and figures following, to-wit:

"EXHIBIT 13.

In the District Court of the County of Dakota, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Re Petition.*

Com*se* now Henry Ostmeyer — person*s* who ha*ve* heretofore signed the petition and articles of association for the formation of the proposed Drainage District No. 2, and who ha*ve* since the filing of said petition and articles signed other instruments the purpose of which was to present and represent the subscriber*s* as opposed to the organization of said district or as not in favor thereof and hereby re-affirm- and repeat- the petition and articles of association as filed herein and hereby again*st* consent- to and ask- for the formation of said district as petitioned and prayed for in said petition and articles of association.

Dated this — day of October A. D., 1909.

HENRY OSTMYER.

78 STATE OF NEBRASKA,
*County of Dakota, ss:*

On this — day of October A. D. 1909, before me the subscriber a notary public personally appeared —— —— who being by me first duly sworn on oath deposes and says that *that they* signed the foregoing instrument and that it is *their* voluntary act and deed and that the facts therein set forth are true as *they* verily believe-.

—— ——.

Sworn to before me and subscribed and acknowledged in my presence this — day of October A. D., 1909.

—— ——.

Endorsed: Filed this 18 day of Oct. 1909. George Wilkins, Clerk District Court."

Mr. Evans on behalf of the defendants, offered in evidence exhibit 15 filed in the office of the clerk of the district court of Dakota county, October 18, 1909, which said instrument is in the words and figures following, to-wit:

"Ex. 15, J. B. R.

In the District Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Journal Entry.*

Now on this 18th day of October, A. D. 1909, it being a regular day of the September, 1909 term of this Court, this matter
79 came on to be heard upon the motion of the petitioners for the organization of said District, to strike from the answer of the objectioners the names of E. J. Mullally, G. A. Blessing and D. W. Hoch, and to strike the answer, so far as it was the answer of said persons from the files of said case and Court, and was submitted to the Court, and the Court being fully advised in the premises doth sustain the motion, and strikes the names of said parties from the objections and answer of the objectors and remonstrants, and doth strike said answer so far as it is the answer of said parties. And now on the application of the petitioners, Paul Pizey, Esq., is appointed guardian ad litem for the following minors, who are owners of or interested in lands in said proposed District, to-wit: Nellie Maloney, James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray, Thomas Murray and Mabel Heffernan. And now on this day said cause came further to be heard upon the Petition and Articles of Association, the answer of and objections of the objectors and remonstrants and the objection and answer of the guardian ad litem and the evidence and upon the objections of the defendants and objectors and remonstrants to the introduction of any testimony under the Petition and Articles of Association, because the statutes and amendments thereto under which this proceeding is had was unconstitutional and void, and was submitted to the Court and the Court being fully advised in the premises doth overrule said objections, to which ruling of the Court the defendants each severally and separately excepts.

Whereupon Court adjourned to meet Tuesday October 19th 1909 at 10 o'clock A. M.

GUY T. GRAVES, *Judge.*"

80 Mr. Evans, on behalf of the defendants, offered in evidence Exhibit 17, consisting of a journal entry of the district court of Dakota county, Nebraska, entered October 23, 1909, and is in the words and figures following, to wit:

"Ex. 17, J. B. R.

In the District Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Journal Entry.*

Now on this 23rd day of October, 1909, it being a regular day of the September, 1909, term of this Court, this cause came on further to be heard on the petition and Articles of Association and Application of the petitioners and the objections of Michael Boler, Margaret McCormick, Dennis Hogan, Horace Dugan, Michael Quinn, Mary McGonigal, Mary Ahren, P. W. Bridenbaugh, L. L. Heikes, August Niggerman, S. A. Bridenbaugh, Agustus T. Haase, Mike Heffernan, Wm. Cheney, Samuel Heikes, James J. Lapsley, Milton, Foreshoe, L. H. Armbright, George Leamer, Robert L. Lapsley, Julius Lischke, J. C. Gribble, Wm. Ebel, Wm. W. Armour, W. J. Hunt, Emma L. Little, John Blessing, Herman Roost, Henry Ebel, Henry Bierman, Albert Roost, Peter Morgan, W. H. Boals and Fred Bierman, and of Gus Murray, Mary E. Mullally, Luke Murray, Tom Murray, and Mary Murray, and of Nellie Maloney, James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray, Thomas Murray, and Mabel Heffernan, minors, by their guardian ad litem, Paul Pizey, Esq., to the organization of the proposed drainage district and the evidence, and the court having heard said objections, the evidence, and the arguments of counsel, and having been fully advised in the premises, finds upon the issued raised by the pleadings in favor of the petitioners and against the objectors and re-
81 monstrants; and the court especially finds that each and all of the several tracts of real estate embraced within the limits of said proposed district are owned respectively as stated in the petition and Articles of Association herein filed, that the persons who have made and signed said Articles of Association are of lawful age and competent and were at the time of filing said Articles of Association and now are a majority in interest of the owners of the land described in said Articles of Association, and included within said proposed Drainage District; that due and legal notice has been given that application would be made to have said District declared a drainage district for the purpose of draining and reclaiming the same and declared and created a corporation of the State of Nebraska, to each of the several owners of real estate in said proposed drainage district, who may be benefitted thereby but have not signed said Articles of Association; that the body of land embraced within the limits of said proposed drainage districts is a contiguous body of swamp and overflowed lands, comprising approximately 7,137.73 acres of wet, overflowed and submerged lands that will be benefitted by drainage, and that all of said land should

be embraced in said drainage district and liable to taxation for draining the same; that the drainage thereof will be a public utility and will be conducive to the public convenience, health and welfare, and the expense of such drainage will not be disproportionate to the benefits to be derived therefrom; and that the objections thereto and each of them should be overruled; and that said drainage district of the corporate name mentioned in said Articles of Association, to-wit: Drainage District Number Two (2) of Dakota County, Nebraska, with the powers and limitations in said Articles of Association enumerated and such others *are* now or hereafter may be provided by law, should be duly established and declared a
82 public corporation of the State of Nebraska, with the boundaries as described in said Petition and Articles of Association.

It is therefore, considered, ordered, declared, decreed and adjudged by the court that the objections of Michael Boler, Margaret McCormick, Dennis Hogan, Horace Dugan, Michael Quinn, Mary McGonigal, Mary Ahern, P. W. Bridenbaugh, L. L. Heikes, August Niggerman, S. A. Bridenbaugh, Augustus T. Haase, Mike Hepernan, Wm. Cheney, Samuel A. Heikes, James J. Lapsley, Milton Foreshoe, L. H. Armbright, George Leamer, Robert L. Lapsley, Julius Lischke, J. C. Gribble, Wm. Ebel, Wm. W. Armour, W. J. Hunt, Emma S. Little, John Blessing, Herman Roost, Henry Ebel, Henry Bierman, Albert Roost, Peter Morgan, W. H. Boals, Fred Bierman, Gus Murray, Mary Murray, Luke Murray, Tom Murray, and Mary E. Mullally, and of Nellie Maloney, James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray, Thomas Murray, and Mabel Heffernan, minors, by Paul Pizey, Esq., their guardian ad litem, and each of them, be and the same hereby are overruled; and that the said body of land be and the same hereby is established and declared a public corporation of the State of Nebraska, to be designated and known as Drainage District Number Two (2) of Dakota County, Nebraska, with boundaries as follows, to-wit: "(then describing said boundaries which does not include the lands of the plaintiffs in error Henry W. O'Neill and Cornelius K. Heffernan or the lands of Elizabeth Leahy).

83 Mr. Allen for the plaintiffs objected to the introduction of said Exhibit 17 as incompetent, immaterial, irrelevant and no foundation laid, and because it is not shown that it was based upon the petition and application of persons having a majority in interest; not based upon a majority in interest of the owners of the contiguous body of swamp and overflowed lands embraced in the application and therefore the court was without jurisdiction to organize or create drainage district No. 2 into a body corporate and politic; (3) because the court had no jurisdiction over the person or property of the minors mentioned whose names are stated in Exhibit 11; because no service was ever had upon them as such is required by law; (4) it is not shown that the interest of these minors being deducted from the land described in the application left a majority in interest at the time of the final order of the court to give it jurisdiction to establish a drainage district. But it is ad-

mitted that Exhibit 17 is a part of the court records in said proceedings. Objections overruled.

Mr. Evans on behalf of the defendant offered in evidence Exhibit 18, a call for election, filed in the office of the clerk of the district court November 1, 1909, which said instrument is in the words and figures following, to-wit:

"Ex. 18, J. B. R.

In the District Court of the County of Dakota, State of Nebraska.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Call for Election.*

STATE OF NEBRASKA,
*Dakota County, ss:*

Be it known that pursuant to law and by virtue of the order of the District Court of Dakota County, Nebraska made on the
84 29th day of October, A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska a public corporation of the State of Nebraska, I, George Wilkins, Clerk of the District Court do hereby call a meeting of the owners of real-estate in said Drainage District to be held in the Court room in the Courthouse in Dakota City, Dakota County, Nebraska, on the 27th day of November, A. D. 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Dfainage District Number Two (2), of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in said District.

In witness whereof I have hereunto set my hand and affixed my official seal on this 1st day of November A. D. 1909.

[SEAL.] GEORGE WILKINS,
*Clerk of the District Court of*
*Dakota County, Nebraska.*

STATE OF NEBRASKA,
*Dakota County, ss:*

Filed this 1 day of Nov. 1909.
GEORGE WILKINS,
*Clerk District Court.*"

Mr. Allen on behalf of the plaintiffs, objected to the introduction and receipt of said Exhibit 18 as incompeten-, immaterial, irrevelant; because no proper foundation is laid and the court was without jurisdiction to issue the paper. It was admitted, however, that Exhibit 18 is signed by the clerk at the time mentioned and is a part of the files in said matter. Objections overruled.

85 Mr. Evans on behalf of the defendants, offered in evidence exhibit 19, proof of service of the above call, filed in the office of the clerk of the district court November 1, 1909, which said instrument is in the words and figures following, to-wit:

"Ex. 19, J. R. B.

*Proof of Publication.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

Fees:

| | |
|---|---|
| 3 squares 4 times..... | $7.50 |
| Affidavit ..... | .25 |
| Total..... | $7.75 |

To the Land Owners of Drainage District Number Two (2) of Dakota County, Nebraska:

You and each of you are hereby notified that pursuant to law and by virtue of the order of the District Court of Dakota County, Nebraska, made on the 23rd day of October, A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska, a public corporation of the state of Nebraska, and by virtue of the statutes of the State of Nebraska I, Geroge Wilkins, clerk of the said court, do hereby call a meeting of the owners of real estate in said Drainage District to be held in the court room in the court house in Dakota City, Dakota County, Nebraska, on the 27th day of November, A. D. 1909, at 10 o'clock a. m. for the purpose of electing a board
86 of five supervisors of said Drainage District Number Two (2), of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in said District.

I, John H. Ream, being first duly sworn according to law, on oath depose and say that I am the publisher of The Dakota County Herald; that said Dakota County Herald is a legal weekly newspaper; that it is published in an office maintained at Dakota City, in Dakota County, Nebraska; that said newspaper has a bona fide circulation of more than two hundred copies weekly; that it has been published more than fifty two successive weeks prior to the publication of the notice hereunto attached; that it is partly printed in an office maintained at the place of publication, and that the notice hereunto attached was published in said newspaper for 4 successive weeks, the first publication being on the 5th day of November A. D. 1909, and the last publication being on the 26th day of November A. D. 1909.

JOHN H. REAM.

Subscribed to and sworn to before me this 26 day of Nov. A. D. 1909.

[SEAL.]

GEORGE WILKINS,
*Clerk of District Court.*"

In witness whereof I have hereunto set my hand and affixed my official seal on this 1st day of November, A. D. 1909.

[SEAL.]

GEORGE WILKINS,
*Clerk of the District Court of Dakota County, Nebraska.*

87 Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of exhibit 19 (1) because it is unauthorized by law and did not confer upon the persons present at the meeting calling for any authority or jurisdiction to exercise power, or authority over the property of other persons whose real estate is embraced in the proposed district or in any manner affect the same; (2) because the affidavit for service by publication of said notice is insufficient, unwarranted by statute and does not contain the allegation or statement required by statute; (3) because the jurat to said affidavit is insufficient and finally because it is incompetent, immaterial, irrelevant and no foundation laid. But it is admitted that exhibit 19 is a part of the files in said case. Objections overruled.

Mr. Evans on behalf of the plaintiffs, offered in evidence exhibit 20, which was filed in the office of the clerk of the district court November 23, 1909, and is in the words and figures following, to-wit:

"Ex. 20, J. R. B.

To the Land Owners of Drainage District Number Two (2) of Dakota County, Nebraska:

You and each of you are hereby notified that pursuant to law and by virtue of the order of the District Court of Dakota County Nebraska made on the 23rd day of October, A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska a public corporation of the State of Nebraska and by virtue of the statutes of this State of Nebraska, I, George Wilkins, Clerk of the said Court do hereby call a meeting of the owners of real-estate in said Drainage District to be held in the court room in the Court-

88 house in Dakota City, Dakota County, Nebraska on the 27th day of November, A. D. 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2), of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land by him owned in said district.

In witness whereof I have hereunto set my hand and affixed my official seal on this 1st day of November A. D. 1909.

GEORGE WILKINS,
*Clerk of the District Court of Dakota County, Nebraska.*

We, the undersigned, each and severally accept service of the above notice and waive further notice of service thereof.

[SEAL.] SYLVESTER POLLY.
ELIZABETH POLLY.

STATE OF NEBRASKA,
*Dakota County, ss:*

Filed this 23 day of Nov. 1909. George Wilkins, Clerk District Court."

Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of Exhibit 20 as incompetent, immaterial and irrelevant and no foundation laid. But admit the genuineness of the signatures, the time of filing and that it is a part of the files in said matter. Objections overruled.

89 Mr. Evans on behalf of the defendants offered in evidence exhibit 21 which said instrument is in the words and figures following, to-wit:

"EXHIBIT 21, J. B. R.

To the Land Owners of Drainage District Number Rwo (2), of Dakota County, Nebraska:

You and each of you are hereby notified that pursuant to law and by virtue of the order of the District Court of Dakota County, Nebraska, made on the 23 day of October, A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska, a public corporation of the State of Nebraska, and by virtue of the statutes of the State of Nebraska, I, George Wilkins, Clerk of the said Court, do hereby call a meeting of the owners of real estate in said Drainage District to be held in the Court room in the Courthouse in Dakota City, Dakota County, Nebraska, on the 27th day of November A. D., 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2) of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in said District.

In witness whereof I have hereunto set my hand and affixed my seal on this 1st day of November A. D., 1909.

GEORGE WILKINS,
*Clerk of the District Court of Dakota County, Nebraska.*

We, the undersigned, each severally accept service of the above notice and waive further notice of service thereof.

JACOB F. LEAMER.
C. H. BRYANT.
JULIUS LISCHKE.
G. G. SIDES.
THOMAN C. BAIRD.
GLEN ARMOUR.
I. W. FISHER.

90 THE STATE OF NEBRASKA,
*County of Dakota, ss:*

I hereby certify that on the 20th day of November, 1909, I served on the within named by delivering personally a true and certified copy of said writ to each of them, Augustus T. Haase, Lyman L. Heikes, Fred Beerman, August Niggerman, Phillip W. Bridenbaugh, William Cheney, Luther Hikes, Samuel A. Heikes, Milton Foreshoe, Samuel A. Bridenbaugh, Alice E. Sides, Jacob A. Sides, John C. Gribble, James J. Lapsley, George Leamer, Lewis H. Armbright, Barnabas Gribble, Louis Roost, John Sierk, Peter Morgan, John Blessing, John Boler, Michael Boler, Mary Ahren, Mary R. Mullally, Margaret A. McCormick, Dennis Hogan, Michael Quin, Michael Heffernan, Mary Murray, James Harty, John Cullen, Joseph Cullen, James E. Beacom, Hanora Howard, George W. Beacom, Robert O. Hileman, Edith Bridenbaugh, William Ebel, Albert Arnold Roost, Henry Bierman, J. Williams Bridenbaugh, Herman Roost, Herman Roost, Henry Ebel, Mary A. McGonigal, William W. Armour, Thomas Heffernan, John Heffernan, Katie A. Demroe, Lizzie Fields, Alice B. Heffernan, Adam O. Sides, Matilda Sides, Frank Davey, Mary F. Davey, Cornelius Deloughery, Mrs. T. M. Cullen, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, Christ E. Severson, Horace Duggan, Stephen P. Leis, John S. Leis, John Flannery, Dillon J. McDonald, Thomas Hartnett, Ellen A. Hartnett, John Maloney, Hanora Howard, Woods M. Hileman, Mary Harty, John M. Davey, Mabel Brown, John W. Ryan, Sarah E. Erlach, Thomas Hartnett, Catherine Van Hoven, John F. Cain, Ellen Barry, and William Ostmeyer. Non-residents: William H. Boals, William W. Armour, Robert L. Lapsley, J. Williams Bridenbaugh, Edith Bridenbaugh and William Hunt. Minors: Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavas Murray, Thomas Murray, John P. Howard, James Maloney, Joseph Maloney, Mildred Maloney, Mary Maloney, Mildred Maloney, Nellie Maloney and Mabel
91 A. Heffernan. Corporations: Chicago, St. Paul, Minneapolis and Omaha Railway Company, Chicago Burlington and Quincy Railway Company, and the County of Dakota and Pacific Townsite Company, as required by law.

Dated November 24th, 1909.

J. P. ROCKWELL, *Sheriff.*"

Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of Exhibit 21 as irrelevant, immaterial and incompetent, no foundation laid, and because the service is insufficient in so far as it affects any of the minors appearing in the case. It is admitted that the signatures are genuine, that the instrument was duly filed at the time shown and is a part of the files in said proceeding. Objections overruled.

Mr. Evans, on behalf of the defendants, offered in evidence Exhibits 22, 23, and 24, which were filed in the office of the clerk of the district court November 24, 1909, and are in the words and figures following, to-wit:

"EXHIBIT 22, J. B. R.

To the Land Owners of Drainage District Number Two (2) of Dakota County, Nebraska:

You and each of you are hereby notified that by virtue of the order of the District Court of Dakota County, Nebraska, made on the 23rd day of October, A. D., 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska, a public corporation of the State of Nebraska, and by virtue of the statutes of this
92 State of Nebraska, I, George Wilkins, Clerk of the said Court do hereby call a meeting of the owners of real estate in said Drainage District to be held in the District Court *Court* room in the Courthouse in Dakota City, Dakota County, Nebraska, on the 27th day of November A. D., 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2) of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in said district.

In virtue whereof I have hereunto set my hand and affixed my official seal on the 1st day of November A. D., 1909.

GEORGE WILKINS,
*Clerk of the District Court of*
*Dakota County, Nebraska.*

We the undersigned, each and severally accept service of the above notice and waive further notice of service thereof.

JOHN T. DALEY.
JOHN RYON.
J. M. BARRY.
TOM SULLIVAN.
MARY SULLIVAN.

Ex. 23, J. B. R.

To the Land Owners of Drainage District Number Two (2) of Dakota County, Nebraska:

You and each of you are hereby notified that pursuant to law and by virtue of the order of the District Court of Dakota County Nebraska made on the 23rd day of October A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska, a public corporation of the State of Nebraska and by virtue of the statutes of this State of Nebraska, I, George Wilkins, Clerk of the said Court do hereby call a meeting of the owners of real estate in
93 said Drainage District to be held in the court room in the Courthouse in Dakota City, Dakota County Nebraska, on the 27th day of November A. D., 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2), of Dakota County, Nebraska. Each and every acre of land shall represent one share and each and every owner

shall be entitled to one vote for every acre of land by him owned in said district.

In Witness Whereof I have hereunto set my hand and affixed my official seal on this 1st day of November A. D., 1909.

GEORGE WILKINS,
*Clerk of the District Court of*
*Dakota County, Nebraska.*

We, the under-signed, each and severally accept service of the above notice and waive further notice of service thereof.

MARY E. HARTY.
HENRY OSTMEYER.
H. BARTELS.
H. E. BROWN.
ADOLPH BARTELS.
WM. BARTELS.
J. P. BEACOM.
ELLA B. MALONEY.
FREDERICK BARTELS.
BENJ. W. BRIDENBAUGH.
MARY E. ARMOUR.
JOHN HARTNETT.
DANIEL HARTNETT.
ROY ARMOUR.
MARY McGEE.
MARGARET HEENEY.

EXHIBIT 24, J. B. R.

To the Land Owners of Drainage District Number Two (2) of Dakota County, Nebraska:

You and each of you are hereby notified that pursuant to law and by virtue of the order of the District Court of Dakota County,
94 Nebraska, made on the 23rd day of October A. D. 1909, declaring Drainage District Number Two (2) of Dakota County, Nebraska, a public corporation of the State of Nebraska and by virtue of the statutes of this State of Nebraska, I, George Wilkins, Clerk of the said Court do hereby call a meeting of the owners of real estate in said Drainage District to be held in the court room in the Court house in Dakota City, Dakota County, Nebraska, on the 27th day of November A. D., 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2), of Dakota County, Nebraska. Each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land by him owned in said district.

In Witness Whereof I have hereunto set my hand and affixed my seal on this 1st day of November A. D., 1909.

GEORGE WILKINS,
*Clerk of the District Court of*
*Dakota County, Nebraska.*

We, the undersigned each and severally accept service of the above notice and waive further notice of service thereof.

CHARLES H. MAXWELL.
JOSEPH W. GRAY.
JOHN W. SQUIRE.
JOHN FLANNERY.

Endorsed: Filed this 24 day of Nov. 1909. George Wilkins, Clerk District Court."

Mr. Allen, on behalf of the plaintiffs, objected to the introduction and receipt of said exhibits as incompetent, irrelevant and immaterial and because no proper foundation is laid. But the signatures are admittedly genuine, time of filing correct as shown and said exhibits are part of the files in said proceedings.

95 Objections overruled.

Mr. Evans, on behalf of the defendants, offered in evidence exhibit 25, filed in the office of the clerk of the district court, October 18, 1909, which is in the words and figures following, to-wit:

Ex. 25, J. B. R.

In the District Court of Nebraska within and for the County of Dakota.

IN THE MATTER OF THE ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Motion.*

Come now the petitioners herein each for himself and objects to the appearance in this case of each of the following named persons, to-wit:—G. A. Blessing, D. W. Hoch and E. J. Mullally, each and all of said persons having signed the answer and objections hereto filed and having no interest in said proceeding or in any lands affected thereby. And these petitioners move to strike the said answer so far as it is the answer of the said persons or either of them, for each and all of the reasons above set forth.

These petitioners also move to strike the names of said persons and the name of each of them from the said answer because of the reasons above set forth.

JOHN V. PEARSON AND
R. E. EVANS,
*Attorneys for Petitioners.*

(22.)

STATE OF NEBRASKA,
*Dakota County, ss:*

Filed this 18 day of Oct. 1909.
GEORGE WILKINS,
*Clerk District Court."*

96 Received without objection.

Mr. Evans, on behalf of the defendants, offered in evidence exhibit 26, which said instrument is in the words and figures following, to-wit:

Ex. 26, J. R. B.

"Form No. 2.

George C. Junkin, Secretary of State. Addison Wait, Deputy.

State of Nebraska.

Great Seal of the State of Nebraska, March 1st, 1867.

Fee: $20.50.

Office of Secretary of State.

UNITED STATES OF AMERICA,
*State of Nebraska, ss:*

I, Geo. C. Junkin, Secretary of State, of the State of Nebraska, do hereby certify that in compliance with Section 126, Chapter 16, of Compiled Statutes 1905, Articles of Incorporation of 'Drainage District Number Two (2), in Dakota County, Nebraska'. were filed for record in this office on the 12th day of November A. D. 1909, and recorded in Book 9, Drainage Corporations, at Page 237.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska. Done at Lincoln, this 16th day of December in the year of our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States the One Hundred and Thirty-Fourth and of this State the Forty-Third.

[SEAL.] GEO. C. JUNKIN,
*Secretary of State.*
ADDISON WAIT, *Deputy.*"

97 It is admitted that a true, correct and certified transcript of the proceedings of the organization of Drainage District Number Two (2) of Dakota County, Nebraska, had in the district court of Dakota County, Nebraska, commencing with the filing of the petition and articles of association, exhibit 1 and including all exhibits offered and received in evidence down to and including exhibit 17 was filed with the secretary of state and that exhibit 26 is the certificate of the secretary of state, and the same is received without objection.

It is admitted that the same transcript which includes exhibit 27 was filed in the office of the county clerk of Dakota county between the 4th and 18th days of December, 1909, and exhibit 27, which is a blue print map, was received in evidence without objection.

Mr. Evans on behalf of the defendants offered in evidence exhibit 28, being the minutes of the first meeting of the owners of real estate within the proposed Drainage District Number Two (2) of

Dakota county, Nebraska, which instrument is in the words and figures following, to-wit:

"EXHIBIT 28, J. B. R.

Minutes of the first meeting of the Owners of the Real Estate situate and included within Drainage District Number Two (2), of Dakota County, Nebraska.

At the first meeting of the owners of real estate situated and included within Drainage District Number Two (2), of Dakota County, Nebraska, held on the 27th day of November A. D. 1909, at 10 o'clock A. M. in the Court Room of the Court House of Dakota County, in Dakota City, Nebraska, pursuant to the call of the clerk
— the District Court of said County of Dakota, said time and
98 place being the time and place fixed in said call, the following proceedings were then and there had:—

The hour of 10 A. M. of the 27th day of November, A. D. 1909, having arrived, George Wilkins, Clerk of the District Court, of Dakota County, for the state of Nebraska, being present, called said meeting to order and read the call of said meeting, which call was in the words and figures following, to-wit:—

In the District Court of the County of Dakota, State of Nebraska.

IN THE MATTER OF ORGANIZATION OF DRAINAGE DISTRICT NUMBER TWO (2) OF DAKOTA COUNTY, NEBRASKA.

*Call of Election.*

STATE OF NEBRASKA,
*Dakota County, ss:*

Be it known that pursuant to law and by virtue of the order of the District Court of Dakota County Nebraska made on the 29th day of October A. D. 1909, declaring Drainage District Number Two (2), of Dakota County, Nebraska, a public corporation of the State of Nebraska, I, George Wilkins, Clerk of the District Court do hereby call a meeting of the owners of real-estate in said Drainage District to — held in Court Room in the Court House in Dakota City, Dakota County, Nebraska, on the 27th day of November A. D. 1909, at 10 o'clock A. M., for the purpose of electing a board of five supervisors of said Drainage District Number Two (2), of Dakota County, Nebraska.

Each and every acre of land shall *be to* represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in said District.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 1st day of November A. D. 1909.

[SEAL.] GEORGE WILKINS,
*Clerk of District Court of*
*Dakota County, Nebraska."*

99 Said exhibit further shows that John T. Daley was elected temporary president and Charles H. Maxwell temporary secretary; that a committee consisting of Joseph W. Gray, John Ryan and Roy Armour were appointed to determine and report the number of votes to which each person would be entitled whether in person or by proxy from the basis of acreage and ownership, except as the transfers shown to the committee, the findings of the district court in the matter of the organization of said Drainage District No. 2 to govern. The committee then reported the names of one hundred three (103) persons and their acreage, and continues:

"The following owners were present and voted in person in accordance with the acreage as above indicated:—Thomas C. Baird, David Glenn Armour, Adolph Bartels, Augustus F. Haase, Fred Beerman, Roy Armour, William Bartels, Harry E. Brown, William W. Armour, Charles H. Maxwell, Samuel A. Bridenbaugh, Adam O. Sides, James J. Lapsley, W. Irving Fisher, Jacob F. Leamer, Barnabas Gribble, Lewis Roost, J. M. Barry, Frank Davey, Mary E. Davey, Cornelius Deloughery, Mrs. J. W. Ryan, Mrs. W. W. Sheahan, John Boler, Michael Boler, Dennis Hogan, Christ E. Severson, John Flannery, John T. Daley, Dillon J. McDonald, Ellen Maloney, Mary McGee, Dan Hartnett, Thomas J. Hartnett, John Hartnett, Thomas Sullivan, Joseph W. Gray, John Maloney, John P. Beacom, Fred Bartels, Benjamin N. Bridenbaugh, Woods M. Hileman, Mary Harty, Henry Bartels, Willia- Ostmeyer, William Ebel, Albert Arnold Roost, Henry Bierman, John M. Davey, Margaret Heeney, Herman Roost, Henry Ebel, Guy G. Sides, Jacob A. Sides, Thomas E. Heffernan, John Heffernan, Alice B. Heffernan, Mabel Heffernan, John Ryan, and Stephen P. Leis.

That there were present by proxies as above set forth the following owners:—William Cheney, Milton Foreshoe, Matilda Sides, Emma L. Little, W. Clarence Leamer, Freemont E. Leamer, Jesse T. Leamer, Woods M. Leamer, Madius G. Leamer, Peter Morgan,
100 John Blessing, Mary Sullivan, Horace Duggan, Sarah E. Erlach, Joseph Cullen, John Cullen, John W. Squire, Ellen Hartnett, James P. Beacon, Mabel E. Brown, Alice Sides, Joseph W. Heffernan, John W. Ryan, Mary E. Armour. That the following owners within said District were absent and not represented by proxies: Sylvester Polly, Elizabeth Polly, August Niggerman, Phillip Bridenbaugh, Samuel A. Heikes, Lyman L. Heikes, John C. Gribble, Lewis H. Armbright, William H. Boals, George W. Beacom, Robert O. Hileman, J. Williams Bridenbaugh, Henry Ostmeyer, Julius Lischke, Robert L. Lapsley, John F. Cain, Charles Bryant, Mary A. McGonigal, Mrs. T. M. Cullen, Catherine Van Hoven, Mary Ahren, Mary E. Mullally, Margaret A. McCormick, Pacific Townsite Company, Michael Quinn, Michael Heffernan, Mary Murray, Maggie Murray, John Murray, Luke Murray, Gustavus Murray, Thomas Murray, James Harty, John S. Leis, Edith Bridenbaugh."

A roll of those entitled to vote was made up.

"Thereupon the land owners represented in person and by proxy proceeded to organize permanently. * * * Charles H. Maxwell

and Harry E. Brown, were declared duly elected as chairman and secretary respectively of the meeting."

The polls being opened for the election of five supervisors, David Glenn Armour, Daniel Hartnett, Jacob F. Leamer, John T. Daley, and Charles H. Maxwell, were elected supervisors and each of them took, subscribed and filed an oath of office, as required by law.

At a meeting of the land owners of said drainage district held November 26, 1910, pursuant to call and in accordance with the statute with reference thereto, there *was* elected as supervisors of said district, Fred Bartels and David Glenn Armour, two of the defendants in this action, each of whom took the oath of office as prescribed by law.

101 Roy Armour, Joseph W. Gray and John Ryan were appointed such committee and reported the names of one hundred three (103) persons and the acreage represented by them entitled to be voted.

It is admitted by the plaintiffs that exhibit 28 is the correct record of the minutes of the meeting of the persons at the time stated therein claiming to be members or incorporators of the organization known as drainage district No. 2 and is the only record of such.

Mr. Allen for the plaintiffs objected to the introduction of exhibit 28 (1) because the same is incompetent, immaterial, irrelevant, no foundation laid; (2) because the law does not authorize and warrant the keeping of such book; (3) because the record does not prove itself; (4) because it is not shown that the persons represented were a majority of the persons in interest as required by the statute; (5) because it appears from the exhibit that only 60 persons attended said meeting in person; that 25 were represented by proxy and 35 absent and because under the law no proxies were permissible or allowed at such meeting; (6) because it appears that a greater number of persons in interest in said proposed district were absent from said meeting and those present were without authority to organize or elect a board of supervisors; (7) because no foundation is laid in that there is no evidence that the persons said to be represented by proxy had actually given said proxies or were represented by them. Objections overruled.

Mr. Evans, on behalf of the defendants, offered in evidence exhibits 29, 30, 31, 32, and 33, being the affidavits of John T. Daley, David Glenn Armour, Jacob F. Leamer, Charles H. Maxwell and Daniel Hartnett, as supervisors of said Drainage District No. 2 and are not inserted.

102 Mr. Evans, on behalf of the defendants, offered in evidence exhibit 34, consisting of minutes of the first meeting of the supervisors of Drainage District No. 2 of Dakota County, held November 27, 1909; a meeting at the office of R. E. Evans, Dakota City, December 4, 1909; a meeting at the office of R. E. Evans, Dakota City, December 18, 1909; a meeting at the office of R. E. Evans, Dakota City, January 8, 1910; a meeting at the office of R. E. Evans, Dakota City, January 20, 1910; a meeting at the law office of R. E. Evans, Dakota City, February 19, 1910; a meeting at the Fremont hotel, Jackson, February 21, 1910; a meeting in the same place

February 22, 1910; a meeting at the law office of R. E. Evans, Dakota City, March 5, 1910; a meeting at the law office of R. E. Evans, Dakota City, March 11, 1910; a meeting at the law office of R. E. Evans, Dakota City, March 12, 1910; a meeting at the law office of R. E. Evans, March 14, 1910; a meeting at the law office of R. E. Evans, March 15, 1910; a meeting at the law office of R. E. Evans, March 19, 1910; a meeting at the law office of R. E. Evans, March 21, 1910; a meeting at the law office of R. E. Evans, Dakota City, April 2, 1910; a meeting at the residence of John T. Daley, near Jackson, April 5, 1910; a meeting at the law office of R. E. Evans, Dakota City, April 9, 1910; a meeting at the law office of R. E. Evans, Dakota City, April 21, 1910; a meeting in district court room, Dakota County, May 5, 1910; a meeting in the district court room in the courthouse in Dakota City, Dakota County, Friday, May 13, 1910; a meeting in the district court room, Dakota County, May 23, 1910; a meeting in the district court room at Dakota City, May 28, 1910; a meeting in the district court room at Dakota City, June 4, 1910; a meeting at the law office of R. E. Evans, Dakota City, July 2, 1910; a meeting at the law office of R. E. Evans, Dakota City, August 6, 1910; a meeting at the law office of R. E.
103 Evans, Dakota City, October 1, 1910; a meeting at the law office of R. E. Evans, October 4, 1910; a meeting at the law office of R. E. Evans, October 14, 1910; a meeting at the law office of R. E. Evans, November 5, 1910; a meeting at the law office of R. E. Evans, December 3, 1910; a meeting in the district court room at Dakota City, December 17, 1910; a meeting at the law office of R. E. Evans, January 7, 1911; a meeting at the law office of R. E. Evans, Dakota City, January 17, 1911; a meeting at the law office of R. E. Evans, Dakota City, January 20, 1911; a meeting at the law office of R. E. Evans, Dakota City, February 3, 1911; a meeting at the law office of R. E. Evans, Dakota City, February 18, 1911, and a meeting at the law office of R. E. Evans, Dakota City, April 1, 1911, which said instrument is in the words and figures following, to-wit:

DISTRICT COURT ROOM, *November* 27, 1909.

* * * * * * *

All of said supervisors were present, Daniel Hartnett, David Glenn Armour, Jacob F. Leamer, John T. Daley, and Charles H. Maxwell, whereupon lots were drawn which resulted in the following: Charles H. Maxwell was declared supervisor for five years, John T. Daley for four years, Jacob F. Leamer for three years, Daniel Hartnett for the term of two years and David Glenn Armour for the term of one year. John T. Daley was elected chairman and Jacob F. Leamer secretary of said board. * * * On motion duly made and carried R. E. Evans was appointed attorney for the board of supervisors for said district.

"It was moved and seconded that the meetings of the board of supervisors be held in the office of R. E. Evans in Dakota City, Nebraska, or at such place as called by the chairman, and regular

meetings to be on the first Saturday of each month at 10 o'clock a. m." * * *

"Office of R. E. Evans, Dakota City, Nebraska, January 8th, 1910.

* * * Resolved: That the district enter into contract with
104 the Towl Engineering Company for all the engineering and surveying work for the district up to and including the letting of the contract for excavation for the gross price of $450.00, payable one-half when the work is half done and the remainder when the complete report is filed; and that C. H. Maxwell be and he hereby is appointed as a committee to look after the making of said contract ready for signature. * * *

Interested persons may inquire of R. E. Evans of Dakota City, Nebraska, as to district boundaries and for sources of information, and will find plat of district on file in county clerk's office at Dakota City, Nebraska, and description of district in office of clerk of the district court, Dakota county, Nebraska. * * *

Law office of R. E. Evans, Dakota City, Nebraska, Feb. 19, 1910. Board of supervisors met pursuant to call by the president and in accordance with notice all members of the board being present, Engineer Mr. Nelson, of Towl Engineering Company, presented his preliminary report and plat showing proposed ditches for the drainage of Drainage District No. 2 of Dakota County, Nebraska, and after discussion and consideration thereof it was moved that the meeting be adjourned until Monday, February 21st, 1910, at 10 o'clock a. m., at which time the board should commence at the Fremont Hotel in Jackson, Nebraska, and from there go over the line of the proposed ditch. Said motion was duly seconded and upon being put was carried. * * *

Fremont Hotel, Jackson, Nebraska, Feb. 21, 1910, 10 o'clock a. m. Board of supervisors met pursuant to adjournment. * * * The board of supervisors and Engineer Nelson proceeded to Jackson lake or Cut Off lake and viewed the proposed route for the ditch from there to its proposed initial point, also viewed the right of way,
its relation to the railroad and other matter- pertinent to said
105 route and the drainage of said district. Having completed said work the board and Engineer Nelson drove to the proposed Pigeon Creek Ditch at its proposed initial point and viewed the line of said proposed ditch as suggested by the preliminary report and plat of the engineer." * * *

Law Office of R. E. Evans, Dakota City, Nebraska, March 12, 1910. Quorum present. The resignation of supervisor Daniel Hartnett was presented to the board and by the board accepted and on motion duly made, seconded and unanimously carried, Frederick Bartles was elected supervisor to hold to the next annual election.

Law office of R. E. Evans, Dakota City, Nebraska, March 19, 1910, at 10 o'clock a. m. The final report of Towl Engineering

Company was presented, received by the board, filed with the secretary within less than sixty days after making of the survey upon which the report was based, and a meeting called for the 21st day of March, 1910, for the purpose of considering the report and fixing the time and place of hearing.

"Law office of R. E. Evans, March 21, 1910, 10 o'clock A. M. * * * The following resolution was presented by Supervisor Maxwell:

Resolved, that the boundaries of said district be changed as follows: Commencing at the most westerly point of said Drainage District in Section 13, Township 28, Range 7 as heretofore established, on the southeast side of the right of way of the C. St. P. M. & O. Railway Company; thence southwesterly along the southeast side of said right of way to its intersection with the north and south quarter quarter quarter line through the west half of the southwest quarter of said section 13; thence south along said quarter quarter quarter line to the southwest corner of the northeast quarter of the southwest quarter of the southwest quarter of said section 13; from thence east along the east and west quarter quarter quarter line through the south half of the southwest quarter of said section 13 to the southeast corner of the northeast quarter of the southeast quarter of the southwest quarter of said section 13; thence in a southeasterly direction to the southeast corner of the southwest quarter of the southeast quarter of said section 13; thence in a southeasterly direction to the quarter corner between sections 20 and 21 in township 28, range 8; thence in a southeasterly direction to the southeast corner of the northeast quarter of the southwest quarter of said section 21, township 28, range 8, and there intersect the boundary of said district as heretofore established; also to change the boundary of said district as follows:

Commencing at the intersection of the western boundary of said district with the north and south quarter quarter line through the northeast quarter of section 28, township 28, range 8; thence in a — southeast corner of the southwest quarter of the southwest quarter of the northwest quarter of section 27, township 28, range 8; thence south on the north and south quarter quarter quarter line through the west half of the southwest quarter of said section 27 to the southwest corner of the southeast quarter of the northwest quarter of the southwest quarter of said section 27, thence due east on the quarter quarter line to the southwest corner of the northeast quarter of the southwest quarter of said section 27; thence in a southeasterly direction to the southwest corner of the southeast quarter of the southeast quarter of the southwest quarter of said section 27; from thence southeasterly to the southwest corner of the southeast quarter of the northwest quarter of the northeast quarter of section 34, township 28, range 8; thence east on the east and west quarter quarter line to its intersection with the boundary of the said district at the northeast corner of the southwest quarter of the northeast quarter of
107 said section 34, and that the Chairman of the Board be authorized and ordered to take the necessary steps to secure such change.

And its adoption was moved by him and seconded by supervisor Bartels. Voting Aye: Supervisors Maxwell, Bartels and Leamer. Chairman therefore declared said resolution adopted."

The Towl Engineering Company presented its report (being Exhibit 35), and the 5th day of May, 1910, at 10 o'clock a. m., is fixed as the time and the Court room in the court house in Dakota city, Nebraska, as the place for hearing of objections that may be made to the report, and on motion made, seconded and unanimously carried, the form of a notice in terms complying with the statute was ordered published in the North Nebraska Eagle, said notice being filed by the chairman of the board of supervisors and as required by law.

The meetings of April 2, April 5, April 9 and April 21 were taken up by personal examinations of the drainage district and proposed drainage routes by the board of supervisors.

"The District Court Room of the Courthouse in Dakota City, Dakota County, Nebraska, May 5, 1910. * * *

Comes now M. R. Boler and objects to the adoption of the said report of the Engineer filed before the board in the above cause on March 19, 1910, in so far as the said report proposes to divert the waters of Elk Creek from their natural channel and convey them to what is known as Cut-Off Lake for the following reasons, to wit:

1. By diverting the water of said Elk Creek as contemplated in the report of said Engineer, the water in that portion of said stream running through the east side of the northwest quarter of the northwest quarter of section 12, township 28, range 7, East in Dakota county, Nebraska, will be taken away from said land and
108 objector will be compelled to put a well, wind mill, tanks and supply tank in for the purpose of securing a sufficient water supply for the use of stock and for other uses heretofore supplied by the water of said Elk Creek.

2. Section 23, Article 4 Chapter 89 of the Compiled statutes of 1909, or that part of said section providing that that drainage board may 'straing-ten or shorten and deepen or widen the course of any stream, or abandon the bed of any stream and construct a new channel therefor,' is unconstitutional for the reason that the drainage act of 1905, being chapter 161 of the Section Laws of 1905, of which the above mentioned section is a part, contains more than one subject not clearly expressed in its title, the above mentioned subject in said section 23, not being embraced in the title of said act.

M. R. BOLER, *Objector.*

* * * Said objection, complaint and claim was overruled."
* * *

The grade of the Elk creek Cut Off Ditch was changed from the grade line as shown in exhibit 37 to the grade line as shown in exhibit 38.

"District Court Room, Dakota City, Neb'r, May 28th, 1910, 10 a. m.
* * *

It was moved by Supervisor Maxwell and seconded by Supervisor Leamer that he Board of Supervisors of Drainage District Number Two (2) of Dakota County, Nebraska, do hereby approve and confirm and adopt the report of the engineer of said board now on file with said board as to classification and assessment of benefits to lands and other property in said district and as to the method and character of said improvement as amended by the change in grade and width of the Elk Creek Cut Off Ditch and as amended by the change in assessment of the northeast quarter of the northwest quarter of section 21 township 28 range 8 east, and that said report, so amended, as to such classification and
109 assessment and as to the improvement, its character and the method of making the same be and the same hereby in, by this board, approved, ratified, adopted and confirmed in its entirety. Voting Aye—Maxwell, Leamer, Armour, Bartels and Daley. Voting No—none." * * *

"District Court room, Dakota City, Nebraska, June 4th, 1910." * * * It was moved, seconded and carried that the tax to be levied on the lands and property in said district be based upon the following items, to-wit: (setting forth the items, cost of work, expenses of organization of district, administration expenses and damages in separate items, making the total cost of improvement $84,000, estimated interest on bonds $50,000, making a total cost of construction and interest $134,000.).

"Resolved that we hereby levy a tax upon all the property in Drainage District No. 2 of Dakota County, Nebraska, in proportion to the amount of benefits heretofore assessed against said property by the engineer's report filed herein as modified, approved and confirmed by the Board of Supervisors." * * * (The same being for the items as above enumerated.) "It was moved by Supervisor Armour and seconded by Supervisor Bartels that the Board of Supervisors proceed to condemn the right of way for said improvement both as to the Elk Creek Cut Off Ditch and the Pigeon Creek Ditch where agreements have not already been made to acquire the right of way for said Ditch, and that the Attorney be hereby instructed to take the necessary proceedings to secure the condemnation of said right of way. Voting Aye—Supervisors Armour, Bartels, Daley and Leamer. Voting No—None. The Chairman declared said motion carried." * * *

Law Office of R. E. Evans, Dakota City, Nebraska, December 3, 1910. * * * It was moved by Supervisor Daley and seconded by Supervisor Maxwell that the Towl Engineering Company elected Drainage Commissioner for the ensuing year. Motion car-
110 ried unanimously and the Towl Engineering Company was by the Chairman declared elected Drainage Commissioner of said District for the ensuing year. * * *

It was moved by Supervisor Maxwell and seconded by Supervisor Bartels that R. E. Evans, attorney for Drainage District No. 2 be empowered, authorized and directed to prepare such papers as

are necessary, institute all proper proceedings and take all necessary action to condemn property for right of way, and for the diversion of Elk Creek as provided by the Engineer's report, where agreements cannot be obtained on terms satisfactory to the committee. Motion unanimously carried and so declared by the Chairman. * * *

Law Office of R. E. Evans, Dakota City, Nebraska, Jan. 17, 1911. * * * It was moved by Supervisor Bartels and seconded by Supervisor Maxwell that the attorney for the Drainage District be ordered with all possible haste to present to the Courts and carry to a final settlement the action instituted by Henry O. Neill, Elizabeth Leahy and Cornelius K. Heffernan." * * *

Law office of R. E. Evans, Dakota City, Nebraska, January 20, 1911. * * * The bids of contractors for the construction of the ditches were opened and the contract for the construction of the Elk Creek Ditch awarded to Pollard-Campbell Dredging Company.

Law Office of R. E. Evans, Dakota City, Nebraska, February 3, 1911. The bond of Pollard-Campbell Dredging Company and the contract for the same presented and approved and contract signed.

111 Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of exhibit 34 (1) because the same is incompetent, immaterial and irrelevant and no foundation laid; (2) because said so-called drainage district was never legally or properly organized; (3) because the majority of persons in interest at said meeting were absent and did not participate in said meeting and in the so-called election of John T. Daley, chairman and Jacob F. Leamer, secretary, were legally unauthorized and all said meetings subsequently held and referred to are void. Objections overruled.

Mr. Evans on behalf of the defendants offered in evidence exhibit 35, being a communication from the Towl Engineering Company to the defendants, dated March 7, 1910, and complying with section 9 of chapter 116 of the Laws of Nebraska for the year 1903, as subsequently amended and being section 6247 of the Compiled Statutes of Nebraska for the year 1909.

Exhibits 36, 37 and 38 are blue print maps and were introduced by the defendants and received in evidence.

Mr. Evans, on behalf of the defendants, offered in evidence exhibit 39, which is in the words and figures following, to-wit:

"EXHIBIT 39, J. B. R.

In the County Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGES THEREFOR.

*Order for Substitution.*

112 Now on this 19th day of August, A. D. 1910, it appearing to the court that the original petition and application for the appointment of appraisers for condemnation of lands and lots in Dakota County, Nebraska, filed in this Court on or about the 22nd day of July, 1910, has been lost and cannot now be found and application having been made by said district so to do,—It is hereby ordered that Drainage District No. 2 filed a substitute petition and application for the appointment of appraisers for the condemnation of lands and lots in Dakota County, Nebraska, by said Drainage District No. 2.

D. C. HEFFERNAN,
*County Judge.*

In the County Court of Dakota County, State of Nebraska.

STATE OF NEBRASKA,
*County of Dakota, ss:*

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGES THEREFOR.

*Substituted Application for the Appointment of Appraisers.*

To the Honorable County Judge, Dakota County, Nebraska:

Drainage District No. 2 of Dakota County, Nebraska, represents, petitions and states that it is a corporation organized under the laws of the State of Nebraska for the purpose of reclaiming and protecting from the effects of water by drainage or otherwise the lands within the said Drainage District with authority to take and appropriate land for said purpose.

That it has caused to be made a topographical survey of said District with maps and profiles of said survey and a full and
113 complete plan for draining, reclaiming and protecting the lands in said district from the overflow of and damage by water and floods; said survey also setting forth the physical characteristics and location of rights of way, road beds, bridges and improvements in said district belonging to any company, also the loca-

tion of any and all public highways, ditches or other improvements, and has caused to be made a full and complete plan and assessment of the benefits to all property within said district; and that said plan, report, survey and profiles so made and presented as amended and approved by the Board of Supervisors of said district; and has been duly ratified, adopted, approved and confirmed it has located, staked out and ordered constructed, two ditches, the one called 'Elk Creek Cut Off' and the other 'Pigeon Creek Ditch'; said Elk Creek Cut Off Ditch beginning at the intersection of Elk Creek and Honey Creek in the southwest quarter of the Northwest quarter of section 35, Township 29 North of Range 7 East and following and parallel with the Chicago, Burlington & Quincy Railroad to where it crosses the Chicago, St. Paul, Minneapolis & Omaha Railway, at or near the South line of the villege of Jackson; thence in a Northeasterly direction to a point in the Southwest quarter of Section 28, Township 29, North of Range 8, East, in said Dakota County at the intersection of the line of said ditch with said 'Cut Off Lake' which empties into the Missouri River. That same is laid out and numbered consecutively from zero at the up-er end to Station number 126 at the outlet. The size of the said ditch is as follows: From Station zero to 26 the base of said ditch is 20 feet, bermes 5 feet, subgrade 2 to 3 feet; from station 26 to station 126 the base is 30 feet, the bermes 20 and the subgrade 4 feet, and with side slopes of one horizontal to one vertical profile of said ditch marked 'Exhibit A' is hereto attached and made a part thereof. Said
114 ditch and improvement will require a right of way 175 feet wide, from station zero to 26 and from station 26 to the end at Cut Off Lake a right of way 200 feet wide will be required."
* * *

(Each tract crossed by the proposed route of said ditch being described in manner similar to the following).

"A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located, over and across the Northeast quarter of the Northwest quarter of Section 36, Township 29, Range 7, East, being 2.3 acres, and Cornelius K. Heffernan, owner, Mary Heffernan, Mortgagee. (This writ prior to a W. D. from Mary Heffernan to Cornelius K. Heffernan but is not released.)

A right of way 200 feet in width, being 100 on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across the Northwest quarter of the Northeast quarter of Section 36, Township 29 Range 7, East, being 6.94 acres, Cornelius K. Heffernan, owner, Mary Heffernan, Mortgagee. (This writ was prior to a W. D. from Mary Heffernan to Cornelius K. Heffernan but is not released). * * *

A right of way 20 feet in width, being 100 feet on each side of the center of said Elk Creek Cut Off Ditch as now located over and across the Southwest quarter of the Southwest quarter of Section 28, Township 29 Range 8, being 3.63 acres and Henry W. O'Neill being owner.

A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as not located over

and across Lot 5 or the Northwest quarter of the Southwest quarter of Section 28, Township 29, Range 8, being 0.67 acres, Henry W. O'Neill and Mary Agness Swift formerly Mary Agness Conway, owners.

115 A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located, over and across Lot 4 or the Southeast quarter of the Southeast quarter of Section 29, Township 29, Range 8, being 5.8 acres, Henry W. O'Neill, owner.

A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across the Southeast quarter of the Southeast quarter of Section 25, Township 29, Range 7, being 3.5 acres and Elizabeth L. Leahey being the owner, Ed T. Kearney, mortgagee, (this mortgage was given by D. C. Heffernan.) * * *

Your petitioner, the said Drainage District, represents that the said several owners and claimants of said respective lands and lots hereinbefore described have refused to grant the right of way over said land and the appropriation of the same by your petitioner for said purpose and your petitioner and said owners cannot agree upon the price to be paid therefor.

Wherefore your petitioner prays that said appraisers shall be appointed for said purpose as by the statute in such cases made and provided.

DRAINAGE DISTRICT NUMBER TWO (2), DAKOTA COUNTY, NEBRASKA,
By Its Attorney, R. E. EVANS."

Mr. Allen on behalf of the plaintiffs objected to the introduction and receipt in evidence of exhibit 39 (1) as incompetent, immaterial, irrelevant and no foundation laid; (2) because the district court of Dakota county was without jurisdiction to enter or grant

116 leave of substitution; (3) because the substitution petition is insufficient to confer jurisdiction upon the county court to appoint appraisers and award damages or exercise any of the powers conferred by section 14, chapter 89, article 5 of the Compiled Statutes of 1909; (4) because that part of exhibit 39 purporting to be a petition was not properly verified (5) because it is not shown upon the face of the petition that the plaintiffs and defendants, or so-called board of supervisors could not agree with the plaintiffs or any of them on the purchase price of any noted real estate; (6) because under the drainige acts water cannot be diverted from the course of its natural flowage; (7) because Drainage District No. 2 had no power to invoke the right of eminent domain as to lands lying in an opposite direction from the natural drainage of the lands sought to be drained nor to divert the waters of Elk creek which was a stream within well defined channels and banks. But it is admitted that Ex. 39 is one of the files of the County court in the proceeding and the dates and filing marks are correct. Objection overruled. It was then stipulated that the original petition was filed in the County court on July 18, 1910.

Which objections were overruled and the exhibit received in evidence, to which the plaintiffs excepted.

Mr. Evans on behalf of the defendants offered in evidence exhibit 40, entitled Appointment of Appraisers, which instrument is in the words and figures following, to-wit:

117 "EXHIBIT 40, J. B. R.

In the County Court of Dakota County, State of Nebraska.

STATE OF NEBRASKA,
*County of Dakota, ss:*

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGES THEREFOR.

*Appointment of Appraisers.*

Now at this time, July 22nd, 1910 in pursuance of the annexed application made by Drainage District No. 2 of Dakota County, Nebraska for the appointment of appraisers to appraise the damage for the taking and the appropriating of the several strips and tracts of land described in said application for the purpose of reclaiming and protecting from the effects of water by drainage or otherwise the land within said district as therein defined and set forth; and in pursuance of the statute in such cases made and provided, I do hereby appoint the following named persons residents of Dakota County, Nebraska and dis-interested free-holder- therein, to-wit: Michael Beacom, Fred Voss and Chris Hansen, as appraisers to appraise all the damages done to the several tracts of land in said application described and to the owners thereof by reason of the taking and appropriating of said several strips and tracts of land for the location, use and construction of said improvement over and across the same, and I do hereby fix the 9th day of August, 1910, at 10 o'clock A. M. as the day and hour when said appraisers shall meet at my office and proceed to examine, view and investigate the said real estate so appropriated for said purpose and hear the parties interested in the same as the law provides.

118 Witness my hand and the seal of office this 22nd day of July, 1910.

[SEAL.] D. C. HEFFERNAN,
*County Judge.*"

Mr. Evans on behalf of the defendants offered in evidence exhibit 41, which instrument is in the words and figures following, to-wit:

Ex. 41, J. B. R.

"STATE OF NEBRASKA,
*County of Dakota, ss:*

In the County Court of Dakota, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGE THEREFOR.

To the Sheriff of Dakota County, Nebraska:

You are hereby notified that in pursuance of an application filed with me by Drainage District No. 2 of Dakota County, Nebraska, asking for the appointment of appraise-s to appraise the damages done the several tracts of land appropriated by the said Drainage District No. 2 of Dakota County, Nebraska, for the location, use and construction of ditches and Drainage improvements over the same and for the appraisement of damages done to the owners thereof which said several tracts of land and owners are described in said application hereby referred to, and in pursuance of the provision of Chapter 15 of Cobbey's Annotated Statute-, I have appointed
119 the following named persons, disinterested free-holders in said County of Dakota as appraisers to appraise all damages done by the appropriation of said lands for said Drainage District No. 2, to-wit: Michael Beacom, Fred Voss and Chris Hansen; and you are hereby notified to summon said appraisers to appear at my office on the 9th day of August, 1910, at 10 o'clock A. M. and there to be sworn as provided by law and proceed to view, investigate and examine the several tracts of land and lots so appropriated by said Drainage District No. 2 of Dakota County, Nebraska, for the purpose as in said application set forth and to hear the parties interested in the same as by law provided and make due return of this notice to me as by law provided.

D. C. HEFFERNAN,
*County Judge.*

Endorsed: Dakota City, Neb. July 28, 1910. Received the within notice on the day of its date and served the same on July 23rd, 1910, by delivering to each of the within named persons a true and certified copy of the within notice. J. P. Rockwell, Sheriff.

**Cost:**

| | |
|---|---|
| Service & return | .50 |
| Copies | .75 |
| Mileage | 3.50 |

Filed July 27, 1910.

D. C. HEFFERNAN,
*Co. Judge."*

120 Mr. Evans on behalf of the defendants offered in evidence exhibit 42, being the oath of appraisers, which instrument is in the words and figures following, to-wit:

Ex. 42, J. B. R.

"STATE OF NEBRASKA,
*County of Dakota, ss:*

In the County Court of Dakota, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGES THEREFOR.

*Oath of Appraisers.*

We, Michael Beacom, Fred Voss and Chris Hansen appraisers appointed by the County Judge of Dakota County to appraise the damages done in the several tracts of land described in the annexed application and to the owners thereof by reason of the appropriation of said lands by Drainage District No. 2 of Dakota County, Nebraska, for the location, use and construction of ditches and embankments and drainage works over the same, being each duly sworn depose and say that we are disinterested free-holders of said County of Dakota, and that we will thorough examination make of said lands and lots described in the annexes application appropriated by said Drainage District No. 2 of Dakota County, Nebraska, for the purpose in said application set forth and as defined therein and due appraisement make of the damages done to each of said respective tracts and the owners thereof as by law provided and make due return thereof as by law provided.

MICHAEL BEACOM.
FRED VOSS.
CHRIS HANSEN.

121 Subscribed and sworn to before me and in my presence by the said Michael Beacom, Fred Voss and Christ Hansen on this ninth day of August, 1910.

D. C. HEFFERNAN,
*Co. Judge.*

Mr. Allen on behalf of the plaintiffs objected to the introduction in evidence of exhibits 40, 41 and 42 because the same are incompetent, immaterial and irrelevant and no proper foundation is land, and because it is not shown that the county court had jurisdiction to appoint appraisers, but admits that each is a part of the records and files in the office of the county judge. Objections overruled, to which ruling the plaintiffs excepted.

Mr. Evans on behalf of the defendants offered in evidence exhibit 43 being an affidavit of R. E. Evans, which instrument is in the words and figures following, to-wit:

Ex. 43, J. B. R.

"STATE OF NEBRASKA,
*County of Dakota, ss:*

In the County Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGE*d* THEREOF.

R. E. Evans being first duly sworn on oath deposes and says that Drainage District Number 2 of Dakota County, Nebraska, a
122 corporation of said State of Nebraska on the 22nd day of July A. D. 1910, filed its petition and application in the office of the County Judge in Dakota County, Nebraska, the object and prayer of which are, to condemn a right of way for and to secure the appointment of appraisers to appraise the damages occasioned by the location, construction and operation of the ditches across the lands hereinafter described and all damages incident thereto, and that thereupon appraisers were appointed by said Judge in pursuance of the statute in such cases made and provided to appraise the damages occasioned by said ditches' construction, operation and incident to said improvement to the following described tracts, lots and parcels of land, to-wit: * * *

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 5 of the Northwest quarter of the Southwest quarter of Section 28, Township 29, Range 8, being 0.67 acres, Henry O'Neill and Mary Agnes Swift formerly Mary Agnes Conway, owners. * * *

Sworn to before me and subscribed in my presence this 26th day of July, 1910.

[SEAL.] GEORGE WILKINS,
*Clerk Dist. Court.*

Endorsed: Filed July 27, 1910. D. C. Heffernan, Co. Judge."

Mr. Evans on behalf of the defendants offered in evidence exhibit 44, being proof of publication, which instrument is in the words and figures following, to-wit:

123 "EXHIBIT 44, J. B. R.

*Proof of Publication.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

Publisher's Fees:

| | |
|---|---|
| 11 sqrs., 4 insertions | $27.50 |
| Affidavit | .25 |
| Total fees | $27.75 |

I, Wm. A. Schmied, being first duly sworn according to law, on oath depose and say that I am publisher of the North Nebraska Eagle, a legal weekly newspaper, printed in part and wholly published in its office in Dakota City, Dakota County, Nebraska, for more than fifty-two weeks last past, and that said newspaper now has and during all of said time had an actual and bona fide circulation of more than two hundred copies weekly within said County of Dakota; and that the notice hereto attached has been published in said paper for 4 successive weeks, not in supplement form, the first publication being on the 29th day of July, 1910, and the last publication being on the 19th day of August, 1910.

WM. A. SCHMIED.

Sworn to befoer me and in my presence subscribed this 20th day of August, 1910.

[SEAL.] R. E. EVANS,
*Notary Public for Dakota County, Nebraska.*

My commission Expires January 12, 1912.

Ex. 44. J. B. R.

124 First publication July 29-4w.

*Notice to Property Owners.*

STATE OF NEBRASKA,
*County of Dakota, ss:*

In the County Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGES THEREFOR.

*Notice to Property Owners.*

To the Central Trust Company of New York, trustee; Wm. H. Coburn, Union Central Life Insurance Company, Mary Agnes Swift, and J. Williams Bridenbaugh:

You and each of you are hereby notified that drainage district No. 2 of Dakota County, Nebraska, a corporation of the state of Nebraska, has surveyed and located ditches over and across the several pieces and tracts of real estate hereinafter described and desires to appropriate, take and hold for the construction, maintenance and operation of said ditches and for excavations, embankments and places for the deposit of waste earth, and all purposes incidental to said drainage improvement a strip of land across said several tracts respectively, for the width hereinafter described, in pursuance of the provisions of section 5563 to section 5597 inclusive and sections 10517 to 10533, Cobbey's Annotated Statutes (1909), and the said several tracts of land, the names of the owners and claimants of title and interest thereto, and the amount of land appropriated, with the description of said several tracts, being as follows, to wit: * * *

125 A right of way 200 feet in width being 100 feet on each side of the center line of said Elk creek cut off ditch as now located over and across lot 5, or the northwest quarter of the southwest quarter of section 28, township 29, range 8, being 0.67 acres, Henry W. O'Neill and Mary Agnes Swift, formerly Mary Agnes Conway, owners. * * *

And you are further notified that upon the application of said drainage district No. 2, filed in the office of the county judge of Dakota County, Nebraska, appraisers have been appointed by said judge in pursuance of the statute in such case made and provided to appraise the damages occasioned by the appropriation of said lands and the location and construction of said drainage over the same, and that the said appraisers will meet at the office of the county judge in Dakota City, Dokata County, Nebraska, on the 23rd day of August, A. D. 1910, at 10 o'clock a. m., and then proceed to inspect and view said real estate, and hear all parties interested in the

same, at which time you and each of you may appear before said appraisers as by law provided.

Dated July 27, 1910.

DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA,
By R. E. EVANS, *Its Attorney.*"

Mr. Allen on behalf of the plaintiffs objected to the introduction of exhibits 43 because it is incompetent, immaterial, irrelevant and no foundation laid; (2) because it is sworn to by R. E. Evans
126 who does not appear to be authorized to make the affidavit; (3) because the verification is improper; (4) because such an affidavit is not authorized by law; and to exhibit 44 for the same reasons assigned in the objections to exhibit 43 and further that the affidavit for service by publication is insufficient because not sworn to and because the so-called jurat does not comply with the law. As to Exhibits 44, 45, 46 and 47 it is admitted by the plaintiffs that the signatures thereto are genuine and that the endorsements correctly set forth the time of the filing of each and that each of said Exhibits is a part of the files in said proceeding.

Objections overruled, to which ruling the plaintiffs excepted.

Mr. Evans on behalf of the defendants offered in evidence exhibit 45, consisting of a notice to property owners and the sheriff's certificate of service thereof, filed in the office of the county judge, August 9, 1910, which instrument is in the words and figures following, to-wit:

"Ex. 45, J. B. R.

STATE OF NEBRASKA,
*County of Dakota, ss:*

In the County Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGE THEREFOR.

*Notice to Property Owners.*

To * * * Cornelius K. Heffernan, * * * Henry O'Neill, * * * Elizabeth Leahy:

127 You and each of you are hereby notified that Drainage District No. 2 of Dakota County, Nebraska, a corporation of the State of Nebraska, has surveyed and located ditches over and across the several pieces and tracts of real estate hereinafter described, and desires to appropriate, take and hold, for the construction, maintenance and operation of said ditches and for excavation, embankments and places for the deposit of waste earth, and all purposes incidental to said Drainage Improvement a strip of land across said

several tracts respectively for the width hereinafter described, in pursuance of the provisions of Section 5563 to Section 5597 inclusive and Sections 10517 to 10533 Cobbey's Annotated Statutes (Edition 1909), and the said several tracts of land, the names of the owners and claimants of title and interest thereto, and the amount of land appropriated, with the description of said several tracts, are attached to this notice and made a part thereof.

And you are further notified, that upon the application of said Drainage District No. 2 filed in the office of the county Judge of Dakota County, Nebraska, appraisers have been appointed by said Judge in pursuance of the statute in such cases made and provided to appraise the damages occasioned by the appropriation of said lands and the location and construction of said Drainage Improvement over the same, and that the said appraisers will meet at the office of the County Judge in Dakota City, Dakota County, Nebraska, on the 9th day of August A. D., 1910, at 10 o'clock A. M. and then proceed to inspect and view the said real estate, and hear all parties interested in the same, at which time you and each of you will appear before said appraisers as by law provided.

DRAINAGE DISTRICT No. 2 OF DAKOTA COUNTY, NEBRASKA,
By R. E. EVANS, *Its Attorney.*"

* * * * * * *

128 Each tract, of land, lot, street or alley crossed, touched or traversed by said proposed ditch is separately described with the same particularity and similar to the following, which are the tracts of land crossed by the ditch and involved in this controversy, and are all shown on exhibit 36.

"A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the northwest quarter of the northeast quarter of section thirty-six (36), township twenty-nine (29), range seven (7), east, being 6.94 acres, Cornelius K. Heffernan, owner, Mary Heffernan, Mortgagee. (This writ is prior to a W. D. from Mary Heffernan to Cornelius K. Heffernan but is not released.) * * *

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the northeast quarter of the northwest quarter of section thirty-six (36), township twenty-nine (29), range seven (7), east, being 2.3 acres, and Cornelius K. Heffernan, owner Mary Heffernan, Mortgagee. (This writ was prior to a W. D. from Mary Heffernan to Cornelius Heffernan but is not released.) * * *

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 4 or the southeast quarter of the southeast quarter of section twenty-nine (29), township twenty-nine (29) range eight (8), being 5.8 acres, Henry W. O'Neill, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over

and across the southwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range
129 eight (8), being 3.63 acres and Henry W. O'Neill being owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 5 or the northwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range eight (8), being .67 acres Henry W. O'Neill and Mary Agnes Swift formerly Mary Agnes Conway, owners.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the southeast quarter of the southeast quarter of section twenty-five (25), township twenty-nine (29), range seven (7), being 3.5 acres and Elizabeth L. Leahey being the owner, Ed T. Kearney, Mortgagee. (This mortgage was given by D. C. Heffernan.) * * *

I, J. P. Rockwell sheriff being duly sworn depose and says that I served the within named John McHugh as secretary of the Pacific Townsite Company of Sioux City, Iowa, he accepting service in Sioux City, Iowa.

J. P. ROCKWELL.

Subscribed and sworn to before me and in my presence this 9th day of August, 1910.

[SEAL.] GEORGE WILKINS,
*Clerk Dist. Court.*

| | |
|---|---|
| Cost service 20 copies..... | $5.00 |
| Copies ..... | 5.00 |
| Mileage ..... | 2.00 |
| Livery ..... | 1.50 |
| Total ..... | $13.50 |

Endorsed: Filed Aug. 9th 1910. D. C. Heffernan, Co. Judge."

130 Dakota City, Nebr., Aug. 8, 1910. Received the within writ on August 1st, 1910, and on August 3rd, 1910, I served the within writ on the within named, James E. Beacom, John P. Beacom, Joseph Cullen, John Cullen, Chris E. Severson, Ed. T. Kearney, James M. Kennelly, James Flynn, Margaret E. Kennelly, Margaret A. McCormick, Cornelius K. Heffernan, James M. Barry, Daniel O'Hanlon, Maggie O'Hanlon and Henry W. O'Neill by delivering to each of them a true and certified copy of the within writ. On the same day I served the within writ upon Michael J. Heffernan, Dennis Hogan by leaving at the usual place of abode and residence of each of them a true and certified copy of the within writ. On August 5, 1910, I served the within writ upon the within named Ellen Maloney, Mildred Maloney, Mary Maloney, James Maloney, and Michael J. Maloney by delivering to Ellen Maloney as their guardian a true and certified copy of the within writ for

each of them and by delivering to each of them a true and certified copy of the writ on August 5, 1910. On August 8, 1910, I served the within writ on Elizabeth Leahey by delivering to her a true and certified copy of the within writ. On August 5th, 1910 I served the within writ upon the Pacific Townsite Company by delivering to John McHugh a true and certified copy of the within writ in the city of Sioux City, Iowa, he, as secretary of the within named Pacific Townsite Company accepting service in the City of Sioux City, Iowa, there being no president, secretary, general manager or other officer of said corporation found in said county.

Mr. Allen on behalf of the plaintiffs objected to the introduction of exhibit 45 (1) because the same is incompetent, immaterial and irrelevant and no proper foundation laid; (2) because the description of the premises is insufficient; (3) because they are unauthroized by statute.

131 Exhibit 46 is the published notice to Mary Agnes Swift and others and in form is a duplicate of exhibit 44.

Mr. Evans on behalf of the defendants offered in evidence exhibit 47, report of appraisers, which instrument is in the words and figures following, to-wit:

"EXHIBIT 47, J. R.

In the County Court of Dakota County, State of Nebraska.

IN THE MATTER OF THE APPROPRIATION AND CONDEMNATION OF LANDS AND LOTS IN DAKOTA COUNTY, NEBRASKA, BY DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA, AND THE ASSESSMENT OF DAMAGE THEREFOR.

*Report of Appraisers.*

To the County Judge of Dakota County, Nebraska:

The undersigns duly appointed appraisers have been duly sworn to assess the damages which will be sustained by the land owners in said County by reason of the appropriation thereto by Drainage District No. 2 of Dakota County, Nebraska, for the purpose of rights of way and grounds necessary for the location construction and convenient use of certain ditches located over and across the several pieces and tracts of real estate hereinafter described and for the excavation, embankments and place for the deposit of waste earth and all purposes incidential to drainage improvement do respectfully report that such notice has been given, that in pursuance of such appointment and upon proof that to all owners of the property hereinafter described, that they met at your office on the 9th day

132 of August, A. D. 1910, at 10 o'clock A. M., for the purpose of performing their duties as such appraisers, and thereupon proceeded to view and carefully inspect each and all of said tracts hereinafter described and hear- each and every party interested therein in reference to the amount of damages he or she sus-

tained who desired to be heard, and thereafter upon due consideration made the following awards and assessment of damages which the owner or owners will sustain by reason of the appropriation by said Drainage District Number Two (2) of Dakota County, Nebraska, parcels of ground hereinafter more particularly described, each piece or parcel of ground and the owner or owners thereof, the amount assessed as damages of said piece, parcel or tract, such assessment being made under the provisions of the statute of Nebraska in relation to the condemnation of real estate under the law of eminent domain as applied to drainage districts:"

(Each tract crossed by said proposed ditch being separately described, the name of the owner given, the width of the tract taken, the number of acres and the amount assessed being set forth in form as follows:)

"For a right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the northeast quarter of the northwest quarter of section thirty-six (36), township twenty-nine (29), range seven (7) east, being 2.3 acres do assess the damages to the owners, Cornelius K. Heffernan, Mortgagee, Mary Heffernan. (This writ was prior to a W. D. from Mary Heffernan to Cornelius K. Heffernan but is not released). At Five Hundred & Sixty $560.00 Dollars.

For a right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across the northwest quarter of the northeast quarter of section thirty-six (36), township twenty-nine (29), range seven (7), east, being 6.94 acres, do assess the damages to the 133 owners Cornelius K. Heffernan, Mortgagee, Mary Heffernan. (This writ was prior to a W. D. from Mary Heffernan to Cornelius K. Heffernan but is not released.) At Thirty-two Hundred & Eighty-eight $3,288.00 Dollars. * * *

For a right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 4 or the southeast quarter of the southeast quarter of section twenty-nine (29), township twenty-nine (29) range eight (8), being 5.8 acres do assess the damages to the owners Henry O. Neill, at Thirty two Hundred & Sixty $3,260.00 Dollars.

For a right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the southwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range eight (8), being 3.63 acres do assess the damages to thw owners Henry W. O'Neill, At Six Hundred & Nineteen $619.00 Dollars.

For a right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 5 or the northwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range eight (8), being 0.67 acres do assess the damages to thw owners Henry W. O'Neill and Mary Agnes Swift formerly Mary Agnes Conway, At One Hundred $100.00 Dollars.

For a right of way 200 feet in width being 100 feet on each side

of the center line of said Elk Creek Cut Off ditch as now located over and across the southeast quarter of the southeast quarter of section twenty-five (25), township twenty-nine (29), range seven (7), being 3.5 acres, do assess the damages to the owners Elizabeth L. Leahey, Mortgagee Ed. T. Kearney (this mortgage was given by D. C. Heffernan), At Nine Hundred 900.00 Dollars. * * * M. Beacom, F. Voss, Chris Hansen."

Endorsed Filed Sept. 17th.

134 Mr. Allen on behalf of the plaintiffs objected to the introduction of exhibit 47 (1) because the same is incompetent, immaterial, irrelevant and no proper foundation laid; (2) because the so-called appraisement is not sworn to or verified properly; (3) because it is not in conformity to the statute in such cases; (4) because the description is insufficient and inadequate, (5) because the county court had no jurisdiction or authority to appoint said persons appraisers in said case and said appraisers had no jurisdiction, authority, or power to act under such appointment. Objection overruled, to which ruling the plaintiffs excepted.

Exhibit 48 is a blue print map.

Mr. Evans on behalf of the defendants offered in evidence exhibit 49, being the weather report of the agricultural department of the United States for the month of January, 1905, the substance of which is as follows:

It shows daily the stage of the river, varying from a river gauge of 1.6 feet on the 3d day of December, 1905, to 17.5 feet on July 7, 1905. In July, 1905, it shows a stage varying from 10 feet to 17.5. April on the 1, 2, 3, 8, 9, and 11¼, 1906, it shows a stage varying from 10 feet to 12.6 feet. From May 26, 1906, to July 11, 1906, it shows a state varying between 10 feet and 13.4 feet, the entire month of June being above 11 feet. It shows from the 10th of March, 1907, to the 16th of April, 1907, except the 10th, 11th, and 12th of April, a stage varying from 10 feet to 13.7 feet. From the 27th day of May, 1907, to the 5th day of August, 1907, it shows a stage varying from 10 feet to 15.2 feet, and except for 11 days all the time above 11 feet. It shows that from the 29th of May, 1908, to the 30th day of July, 1908, a stage of the river varying from 10.2 feet to 15.2 feet. All of the month of June, except 4 days being above a stage of the river 10.2 feet or higher for 6 days.

135 It shows from the 3d day of June to the 22 day of July, 1909, a stage of the river varying between 10.2 and 14.5 feet, all of the time except for 6 days being above 11 feet. It shows for the month of March a stage of the river above 10.1 feet for 12 days and on one day a stage as high as 16.6 feet, the day being March 20, 1910. In May, 1910, there are three days with a stage over 10 feet. In June, 1910, there is a stage over 10.1 feet for 3 days.

Exhibits 50 and 51 are blue print maps.

Mr. Evans on behalf of the defendants, offered in evidence exhibit 52, being the deposition of J. O. Wright taken in Florida, April 17, 1911, the substance of which appears hereafter.

On the 22 day of July 1912, the judge of the district court of

Dakota county before whom this case was tried, signed and settled, and ordered filed a bill of exceptions herein in due form and manner of law, which was done and said bill of exceptions was filed in the office of the clerk of said district court of said county on the 3rd day of August, 1912, and on appeal of this case to the supreme court of Nebraska was duly and regularly certified and transmitted to this court and here filed August 12, 1912, and is a part of the record in this case and is in the words and figures following, to-wit:

"By Mr. ALLEN: It is agreed by the ocunsel for the respective parties that the case is now being tried not only upon the motion of the defendants to dissolve the temporary injunction heretofore issued, but also upon the merits and that both the motion and the merits of the case shall be submitted together and the same
136 evidence shall be applicable so far as in its nature is applicable to both.

By R. E. EVANS: The defendants now offer in evidence Exhibit 1, being the articles—the original petition and articles of association filed in the District Court of Dakota County, Nebraska, on the 4th day of September 1909, in the case entitled 'In the Matter of the Organization of Drainage District No. 2 of Dakota County, Nebraska,' being the articles of association and the signatures thereto.

By Mr. ALLEN: Plaintiffs object to the introduction of Exhibit 1 for the following reasons: * * * Sixth: The said Exhibit 1, or articles—said Exhibit 1, or petition offered in evidence doesn't contain any provision or article of rights of said proposed drainage district No. 2 to enter upon or condemn the lands of any person or persons, corporation or associations for drainage or other purposes and particularly contains no provision to that effect authrizing such condemnation of lands lying outside of and beyond the jurisdiction of said proposed drainage district. * * *

Eighth. Because under Section 1, Article 11-B of the Constitution of Nebraska the so-called Drainage District No. 2 could not be organized by any special act of legislature and because under the Constitution of the State of Nebraska all laws shall be uniform and the Legislature have no power to make any special—to designate a special method for the organization of so-called Drainage District corporations as distinguished from the method employed in the organization of other corporations for pecuniary gain or profit. * * *(Exhibit 1 received in evidence.) * * *

Plaintiffs object to the introduction of Exhibits 4, 5, 6 and 7 and each of them because it appears from Exhibit 1 that the lands of these respective parties *was* embraced in the so-called drainage district No. 2 and the Court at the time of the entering of the
137 order, October 23rd, 1909, was without jurisdiction over the lands of these parties or over their person not being shown that they appeared in any form—were ever served with summons or notices as required by law or given the length of time to appear as required by law and therefore the Court had no jurisdiction to enter any degree or order creating the corporation and for the reason that the Court was powerless to create this corporation in so far as the order to that effect was usurpation of legislative power.

The COURT: Objections overruled.
Plaintiffs, and each of them except.
(Exhibit 7 received in evidence.)

By R. E. EVANS: Defendants offer in evidence Exhibit 8, being the summons and return thereon and the endorsements thereon, issued to the sheriff *to* Dakota County in the Matter of the Organization of Drainage District No. 2 of Dakota County, Nebraska.

By Mr. ALLEN: Plaintiffs object to the introduction of exhibit 8, * * * Fifth: Because the summons requiring the defendants to appear on the 4th day of October 1909 and make defense and notifying them unless they should answer on or before the 4th day of October 1909 the petition and articles of association for drainage district to be known as 'Drainage District No. 2 of Dakota County' was insufficient to confer on the District Court jurisdiction or authority to enter the order made October 23rd, 1909. * * *

Objections overruled. Plaintiffs, and each of them, except.
(Exhibit 8 received in evidence.) * * *

By R. E. EVANS: The defendants offer as Exhibit No. 17 all after the figures on page 30 of the District Court Journal 'I' of the District Court of Dakota County, Nebraska—all after the words 'Guy T. Graves, Judge'—all on said page after the words 'Guy T.
138 Graves, Judge' all of Page 31 and all of page 32 to the words 'Guy T. Graves, Judge' as they first appear on said page.

By Mr. ALLEN: Plaintiffs object to the introduction of this exhibit * * * Second: Because it is not shown that it was based upon petition and application of persons having a majority in interest—persons—not based upon a majority in interest of the owners of the contiguous body of swamp and overflowed lands embraced in the application, petition or articles of association and therefore the Court was without jurisdiction to organize or create Drainage District Number two (2) into a body corporate and politic. * * *

Fourth. It is not shown that the interest of the -state of these minors being deducted from the land described in the application or articles left a majority in interest at the time of the entry of the final order of the Court to give it jurisdiction or authority to establish a drainage district No. 2 and finally because the whole proceeding of the District Court in the application to organize Drainage District No. 2 of Dakota County is based upon the supposition that the Court had jurisdiction regardless of the statute and regardless of the proper showing to enter such order which does not appear in the case so far and because in that case the Court undertook to exercise legislative power instead of judicial power and because the journal entry is void in so far as it effects the property of the minor persons not served. * * *

Objections overruled. Plaintiffs, and each of them except.
(Exhibit 17 received in evidence.) * * *

By R. E. EVANS: Defendants offer all of exhibit 34 from page 100 to page 190 both, inclusive, being the minutes or records of the minutes of the meeting of the board of supervisors of Drainage District No. 2 of Dakota county, Nebraska, from the time of its organization up to and including the 7th day of January, 1911.

By Mr. ALLEN: * * * Second. Because said so-called Drain-

age District No. 2 was never regularly or properly organized not being persons present enough at the first meeting in interest
139 to organize the same.

Third. Because the majority of persons in interest at said meeting were absent and did not praticipate in said meeting and the so-called election of J. T. Daley, Chairman, and Jacob F. Leamer, Secretary, were legally unauthorized and all said meetings subsequently held and referred to in the exhibit based upon the first meeting and election and proceedings of first meeting are void. * * *

Objections overruled. Plaintiffs and each of them except. (Exhibit 34 received in evidence.)" * * *

JACOB F. LEAMER, on behalf of defendants, testified:

Direct examination:

Age 55, residence Dakota City; am secretary and treasurer of Drainage District No. 2, have been since it was organized. Have been absent from no meetings. Exhibit 34 is a record of the proceedings of the board of supervisors. Yes sir, the correct minutes entered under my direction. Exhibit 35 is the report of the engineers of the Drainage District, the Towl Engineering Company of Omaha. Exhibit 36 is the map and estimate sheet referred to in exhibit 35. Exhibit 37 is the profile of the Elk ditch alluded to in exhibit 35. The filing marks on exhibits 35, 36 and 37 are marked on the back of said exhibits. Yes, this method was modified in some respects, so far as the Elk creek ditch was concerned. Exhibit 38 is the profile of the Elk creek ditch as the same was charged and is now contemplated.

By Mr. ALLEN: Plaintiffs object to the introduction of
140 these exhibits 35, 36 and 37 and each of them and to the introduction of each of them because * * * Second: Because there is nothing to show that a competent civil engineer or surveyor was employed by the so-called board of supervisors or by the so-called Drainage District No. 2. * * *

Objections overruled. Plaintiffs, and each of them except. (Exhibits 35, 36 and 37 received in evidence.)" * * *

Same objections were made to the introcution of exhibit 38, which is received in evidence.

"By R. E. EVANS: Defendants offer in evidence Exhibit 39, being the order of substitution and the substituted application for the appointment of the appraisers for the condemnation of real estate along the line of the Elk Creek ditch and also along the line of the Pigeon Creek ditch.

By Mr. ALLEN: Objected to by the plaintiffs. * * *

Second. Because the County Court of Dakota County, Nebraska, was without jurisdiction to enter or grant leave of substitution in the case of the matter of the appropriations and condemnation of lands and lots of Dakota County, Nebraska, by Drainage District No. 2 of Dakota County, Nebraska and for the assessments of damages therefor.

Third. Because the petition—substituted petition is insufficient to

confer jurisdiction upon the County Court to appoint appraisers or an appraising jury to view the premises and award damages or exercise any of the powers conferred by section 14, Chapter 89, Article 5 of the Compiled Statutes of 1909. * * *

141 Fifth. Because it is not shown upon the face of the petition that the plaintiffs and defendants *are* that the so-called board of supervisors of Drainage District could not agree with the plaintiffs or any of them on the purchase price of any noted real estate by reason therein as required by law and it is only upon the failure to make such an agreement that the Court would have power to appoint appraisers.

Sixth. Because under the drainage acts of the legislature the drainage must be in the line of the flowage of the water and can not be diverted—water can not be diverted from the course of its natural flowage. * * *

Objections overruled. Plaintiffs, and each of them, except.

(Exhibit 39 received in evidence.) * * *

By R. E. EVANS: Defendants offer in evidence Exhibit 43 being the affidavit for service by publication in the condemnation proceedings of Drainage District No. 2 Dakota County, Nebraska, in the County Court or before the County Judge of Dakota County, Nebraska and in connection therewith Exhibit 44 being the notice and the proof of the publication thereof.

By Mr. ALLEN: Plaintiffs object to the introduction of exhibit 43 for the following reasons: * * *

Second. Because it is sworn to by R. E. Evans who does not appear to be attorney or agent of so-called Drainage District No. 2 of Dakota County, Nebraska or authorized to make the affidavit. * * *

Fourth. Because such an affidavit is not authorized by law and the plaintiffs object to the introduction of Exhibit 44 for the same reasons assigned in the objection to Exhibit 43 and the further objection that the affidavit of service for publication is insufficient because not sworn to and because the so-called jurat doesn't

142 comply with the law because the so-called affidavit doesn't show upon its face that at the time of the publication of the notice the North Nebraska Eagle had a circulation of at least 200 bona fide subscribers one year before the publication or before the making of the affidavit as required by the stature and incompetent; immaterial irrelevant and no proper foundation laid. * * *

Objections overruled. Plaintiffs and each of them, except.

(Exhibits 43 and 44 received in evidence.)

By R. E. EVANS: Defendants offer in evidence Exhibit 45 together with the endorsements thereon being the notice to property owners in the proceeding in the County Court of Dakota County, Nebraska, entitled, 'In the Matter of the Appropriation and condemnation of Lands and Lots in Dakota County, Nebraska'—entitled as in Exhibit 43 offered in this case and received in evidence and return of the officer thereon.

By Mr. ALLEN: Plaintiffs object to the introduction of Exhibit 45 including the notice and return of the sheriff. * * *

Third. Because the description of the premises is insufficient.

* * * Objections overruled. Plaintiffs and each of them except.

(Exhibit 45 received in evidence.)

By R. E. EVANS: Defendants offer in evidence exhibit 46 with all the endorsements thereon being notice to property owners and the acceptance of service in the proceeding entitled as in Exhibit 43.

By Mr. ALLEN: Plaintiffs object to the introduction of Exhibit 46 including the notice and return of the sheriff. * * *

Third. Because the discription of the premises is insufficient. * * *

Objections overruled. Plaintiffs and each of them, except.

(Exhibit 46 received in evidence.)

143 By R. E. EVANS: Defendants now offer in evidence exhibit 47 being the report of the appraisers in the proceeding entitled the same as in exhibit 43 and in the same court together with the endorsements thereon and the signatures thereto.

By Mr. ALLEN: Objcted to by the plaintiffs * * *

Fourth. Because the description is insufficient and inadequate.

Fifth. And because the County Court had no jurisdiction authority or power to appoint said persons appraisers in said case and the said appraisers had no jurisdiction, authority or power to act under such appointment as appointed. * * *

Objections overruled. Plaintiffs, and each of them, except.

(Exhibit 47 received in evidence.)

Defendants rest."

144 BARNEY C. WOOELY on behalf of the plaintiffs testified.

Direct examination:

Age 44, residence Sioux City, occupation civil engineer; have been civil engineer off and on for 25 years, at Yankton and Sioux City and on different works in different states. Attended the state University, not a full course. My first work was with the C. & N. W. Railway company on construction, then I was with the Sioux City & Northern which is now the Great Northern. I was with the Chicago & Great Western from Ft. Dodge to Omaha. I had charge of construction for 11 miles at Summers. I was on the Chicago & Rock Island and with the Sioux City—the Ashland Cut Off. I was in the City Engineer's office and had charge of the building and digging of the chains in Floyd channel. I planned the farmers' ditch in Woodbury county, Iowa. Yes sir, a pretty big affair. I did not supervise its execution. I never planned any other ditch. Yes sir, I have been to the town of Jackson and west up the Elk creek valley. Yes sir, I know where the confluence of Fox creek and Elk creek is. Fox creek almost within the town limits of Jackson coming from the north. Honey creek probably half a mile from Jackson comes from the southwest; Elk creek generally from the north and west. Yes sir, have been up Elk creek as far as Ponca. The country is very rough, ravines and close together, in a majority of them there is a small stream coming out. The only surveys or observations I have made with a view of determining how much territory Fox creek or Elk creek and its tributaries drain down through Jackson into the valley, was by the use of a topographical

map which gives it to be about 120 square miles; Yes, I went over the country, I made the survey and made the map exhibit 48. It is a map of the meander line or shore line of Cut Off lake, commonly known as Jackson Lake. Exhibit 48 is attached to Vol. 3 of the bill of exceptions. The white mark with the figure 1
145 that is the boring I made to determine the nature of the soil. The boring is 14 feet.

As to just what I found in each boring I couldn't tell until I can get my samples. That is No. 1, a boring taken close to there and it is laid in 5 foot layers. That is the subsoil, the boring marked No. 1 on exhibit 48. The first layer is gumbo, that goes down about 5 feet, the next layer sand and gumbo, the next layer sand about 10 feet. A little clay, not below 10 feet. The said — is quick sand. No. 2 is some boring *No. 3*. No. 3 is down for 5 feet and is hard soil all the way, clay and gumbo. Yes sir, 15 feet, no clay at 15 feet. Bottle No. 5 is practically the same as No. 5. Bottle No. 6 is the same condition except that at two feet we strike a layer of sand, that is two feet thick. About four feet down. I can't say it is quick sand. Yes, I went down 15 feet. You strike clay and at 14 feet you strike sand. Yes sir I went across the territory from boring 1 to boring 8. No sir, there were no posts, stakes or marks to indicate a ditch across there, or survey. There are no stakes along from the confluence of Honey creek and Elk creek that I could find. The only way I could locate the ditch was by taking the statement of the parties who had witnessed the running of the line down here between the two swamps. No sir, nothing that I could find to indicate a survey ever made to that Jackson lake. Yes sir, the land marked M. McCormick is an enclosed field, a cultivated field. No sir, there are no stakes across that cultivated field or any evidence of anybody having been across there to survey or any old ditches or anything of the kind. No sir, nothing that civil engineers call tying. No sir, nothing down at Honey creek to show a tying of the survey. I couldn't go out and locate the ditch. No sir, there is nothing to indicate anybody had been across there or pre-
146 tend- to make a survey there, across the Heffernan property or the Leahy property. Yes sir, the Berry land is cultivated land. No sir, there were no stakes or pits or ditches or anything to indicate a survey there. No sir, nothing to indicate its location. Yes, I think that is the Leahy land. There is nothing at the lake on Henry W. O'Neill's land to locate the outlet of the ditch. No sir, there is nothing from the intersection of Honey creek with Elk creek to show the survey or location of a ditch. No sir, there was not at the time I made this map exhibit 48. I made these observations in February and March of this year (1911). No sir, there is nothing to show which side of the Chicago, Burlington and Quincy R. R. this proposed ditch was located, except the confluence of Honey Creek and Elk Creek, if Honey creek did not run across here and across the track I wouldn't know anything about it. No sir, there is nothing to show how far north of the right-of-way of the Burlington railway any survey was. It (the proposed ditch) goes down following parallel with the C., B. & Q. Ry. where it crosses the

St. Paul to the village of Jackson, that would be down very close to the point No. 3. Yes sir, there are buildings on the north side, the right-of-way fence is there, No sir, there is nothing to indicate upon which side of the road this proposed ditch is. Nothing on the ground at all. No sir, not a bit more than there is a mile north of it or a mile south. The northwest corner of the southwest quarter of section 28 is about four inches west of the figures 28 on the plat exhibit 48. The northwest corner is about 1,300 feet from sounding No. 8 at the mouth of the ditch. The northwest corner of the southwest quarter lies about four inches west, or to the left, of the figure 28 on the map, it is about 1,300 feet from there down to the mouth of this ditch, according to the map. I can't answer that only by scaling it on the map. A line running in a northeasterly
147 direction to a point in the southwest quarter of section 28, township 29 north could strike this Cut Off lake at any point within 3,000 feet and still be in the southwest quarter of section 28. No sir, there is nothing at the point called the mouth of the ditch near sounding 8 to indicate there has been a survey there or to indicate the location of the ditch. There is a very little brush along there. The only way I had of locating the mouth of the ditch was by the use of their plat and locating it at about the intersection of Cut Off lake and this line, 40 line which runs through there and is followed up over the hill. No I don't know that they ever made this survey. No I took the location of the proposed ditch from their plat. No sir, there is no physical object anywhere along there to indicate a survey. No sir, a stranger could not go along there and tell there had been a survey there. In exhibit 48 the contour line of Cut Off lake and the levels are from actual surveys. Yes sir, the levels are the small figures here. Cut Off or Jackson lake is about 7 miles long; its average width is between 4 and 5 hundred feet, its average depth from nothing to 4 or 5 feet. The area of the lake at the ice line in February was about 800 acres. The ice line was higher than the water line, about 8/10 of a foot. All through Mr. O'Neill's land on the south bank of the Jackson lake the height of the bank down to the water or ice line, is about 13 feet in about a mile, varying a tenth or two On the map exhibit 48, this is the original meander line of the survey of the state of Nebraska made in '58; that is the government meander line; that is the United States government meander line of the Missouri river. Yes sir, there was a subsequent meander line, the government put a meander line on the north side. That is not located on the map. The line down here, indicating, is the ice line of Cut Off lake February 12, 1911.
148 "Q. Give the court the outline of the southwest quarter of section 28 * * * as it borders on Jackson lake (the O'Neill land as shown on exhibit 48).

A. The southwest corner of the southwest quarter of section 28, marked 'stone' on the plat. Then east of the point marked 'stone' right hand side between lots, corner between lots 2 and 3 as marked on the plat and the south boundary, thence north practically 2,640 feet, a half mile, thence north on the line between lots 2 and 3, to a line marked 'ice line' February 12, 1911 on Cut Off lake, thence in

a northwesterly direction following that ice line to a point north on the line which is marked 'stone' about 1,700 feet where that line intersects the south boundary of Jackson lake. The only way I can give the distance across the north is to scale it on the map. It is approximately 2,850 feet. That is the ice line, I would testify about 3,000 feet. Haven't any name for it except 'ice line.'

Q. Mark the south boundary of Jackson lake? The bank line is practically the same as the ice line, probably 10 or 12 feet back. The proposed ditch could come east or southeast of where it is marked on this map about 2,100 feet and still be in a northeasterly direction. It could go about 700 feet west or northwest and still be on that tract of land and still enter the lake in the southwest quarter of section 28 (The O'Neill land). Yes I understand Mr. O'Neill owned all of lot 5. Over north of the lake a part of lot 5, the north half of lot 5 marked by the line that divides is a part of the southeast quarter of section 28 (the O'Neill land). Yes sir, 40 acre tract. I did not measure it. That is the two foot contour line about the lake level (witness indicating the yellow line on exhibit 48 marked in pencil two foot contour line). If the water in the lake would raise two feet from the elevation taken on March 30 or 31,
149 this year it would cover the land that is within the contour line from the head of the lake around which is the line followed clear through. This would be approximately, all the land that is in the northwest quarter of the southwest quarter including the lake, would be 40 acres, there is about 4 acres south of the ice line which would reduce it to 36 acres and there would be about 3 acres that would not be covered by the water on the 2 foot contour line. Of course there is a number of acres covered by reason of Jackson lake and prongs that run up in there. Supposing the water would be raised 2 feet about 10½ acres that are not now covered by the waters of Jackson lake would be covered. I found no evidence of any survey at all on the ground. Yes sir, this line (two foot contour line) indicates the land that would be covered by a two foot raise of water. Yes sir, clear to the other end of the lake. Yes sir, all this outside line is what I call the two foot contour line, (witness marks the line with yellow pencil). I have taken this report and the government engineers' report that I have seen and figured the capacity of the ditch with a view of determining the quantity of water the proposed ditch will throw into this lake. The capacity of the ditch is about 5,000 cubic yards per second, about 5,000 cubic yards per second would be poured down there. The so-called ditch starts right above the confluence of Honey creek and Elk creek. The map is probably distorted a little bit, between the railroad tract marked C., B. & Q. R. R. and the line north of that which indicates a corner, there is a right-of-way fence, there is no land in there as I understand it. The location of the center line of the ditch in accordance with the engineer's report, is 87½ feet north of the right-of-way fence, or 137 feet north of the center line of the railroad. There would be more than 50 feet of the right-of-way between the
150 tracts and ditch. How much more depends on the depth of the ditch and amount of dirt they are going to throw up on

the north and south side. They are not going to throw anything against the right-of-way fence. The ditch is 23 feet wide at the bottom and slope of 1 to 1 and 15 feet deep. It would be 25 feet from the center line and that would be 62 feet from the right-of-way fence to the center line of the ditch. Yes sir, there would be the north part of the right-of-way between the tract and the ditch. There would be a space in here between the center of the track and the north side of the right-of-way of 50 feet. No sir, the ditch don't cover any part of that. Yes sir, that is true all down this line as it follows down the railroad here near the crossing where it leaves the road. From the confluence of Honey creek and Elk creek. The right-of-way down there between the track and proposed ditch is low ground. Yes sir, the railroad bridge crosses Elk creek just as Elk creek debouches on the field below. Yes sir, west of that and just after you leave the hills there is a culvert under that railroad. Not a culvert a bridge. A bridge I should say a three bent bridge that would make it 28 feet. I may add all along this south side of Elk creek there seems to be a dyke thrown up anywhere from 4 to 5 feet in height. This three bent bridge covers where there has been some overflow of Elk Creek at some time and water has broken through the levee or dyke that is located north of the track and west of that. Yes west of the bridge shows there has been water flowing down through there that has been the course it has taken, then flowed off to the south. Yes sir, that water would reach the whole bottom land there. Elk creek runs 3 or 4 hundred yards from the bluffs before it reaches another ditch called Old Elk Creek ditch. All this land east from this bridge marked in black is flat, it has the natural pitch to the ground, natural pitch to the south and east.

151 The proposed ditch leaves the railroad about at the crossing marked in black. Well, that is hard to tell how far I don't know the angle as it crosses that track, probably about 200 feet. Yes sir, goes underneath the Omaha road. No, the flood water couldn't flow through there unless the road would raise their track. There would be absolutely no way of putting a dyke on the south side. I did not run levels just took profiles, 26 to a mile 26 and 4/10 I think. From station zero to station 7 the fall is 26 4/10 feet per mile and width of ditch 20 feet on the bottom, referring to exhibit 38, and from station 37 to the end of the ditch shows a 6 foot fall with a base of 20 feet. I don't think I am competent to say whether such a ditch will carry off the water there. We have no soil that will stand a fall of 26 feet to the mile, the effect would be to wear it out at the side. The character of the sub-soil is shown by the borings at that point. Nos. 1 and 2 show quick sand or clay mixed with quick sand, down about 10 feet. No. 3 gives it 15 feet showing a very hard soil all the way down. As I understand it Nos. 26 and 27 comes down at about the railroad crossing. The ditches are 3 and 4 feet below the bottom of the creek at the starting, 300 feet from the starting point probably 12 feet deep and it changes as stations go along. The contour of the ground is irregular and makes it different at different points. The grade line, the profile of the

ground is different at different points. I have had experience in the general wash of ditches and in soils and sub-soils of this kind. At Sioux City and over in Woodbury county. I never did any surveying along the Missouri river and Missouri flats in a ditch proposition. Unless there is a protection put in there by either piling or concrete the water will never stay inside of the ditch or the ditch will not hold its cross section as shown on this plat, it will widen out and will seek its level. No the banks will not hold the water. I don't know how wide the ditch will go. I don't understand
152 that they are going to stop up Elk creek, they are going to leave it open and let the water go on down south. Yes sir, down on the south part of the flat. No sir, that is not indicated from the plat. I get that from the records or ordinances that were adopted or were passed, that Jackson asks of the drainage district. Further east from this bridge and from the Elk creek crossing there is nothing at the railroad crossing to obstruct the waters from flowing to the south there. Before it gets to the railroad corssing of course, they have their levees built up on either side. Yes sir, built on this soft dirt. The water will dig out these dykes and the sides of the ditch will fall in. I might add that at station 26 shown on the profile they only show the bottom of subgrade on the ditch as being 4 feet below Elk creek, but my understanding is there is to be no dyke thrown up on the south side so that in case the water being in the ditch 5 or 8 feet deep there would be a certain portion of it thrown to the south following the creek line. It makes no difference as to the building of the ditch, for the first 2,000 feet it has got to be protected. The banks have got to be protected on account of the wash, from 2,000 feet on or following in a southerly direction you have a fall of about a foot to the mile, a foot and 2/10. Yes sir, going south following the line of the bluffs I believe it is a cheaper proposition than attempting to dig a ditch into Cut Off lake and then attempting to get an outlet into the Missouri river for protection. A raise of 2 feet of Cut Off lake and Jackson lake will have no effect upon the outlet here. Yes sir, the water will lie in there. Yes sir, I have gone over there around Jackson lake. Yes sir, Mr. Smith, a civil engineer from Sioux City and myself made a tour of this here country of Jackson lake and these chutes, last Sunday (witness indicates on the plat the course of his travels at that time). On what is called chute we went above west on
153 the south side of the long chute. On the north edge of it and outside of all this foliage of timber that probably goes back 4 or 5 hundred feet, the land is probably cultivated clear to the river. Not in every instance but does reach it at several points. 5,000 cubic feet per second discharged into Jackson will raise the lake a foot every two hours. After it raised a certain stage, of course, it would go into the river. There was a difference on March 31 between the water level in the Missouri river and the water level in the lake of 3 and 25/100 feet. Yes sir, that was high water in the river. The river was the higher in March of this year. Yes sir, I made observation myself. Yes sir, there was the land between the head of Cut Off lake and the river probably 5 or 6 tenths higher than

that, so that would make 3 feet and 5 tenths and if the water was raised 2 feet it wouldn't reach the river but it would flood the land inside of this yellow line we drew here and in order to get to the river the water would have to be raised in the lake 3 feet and a half, it would take about 7 hours. A foot every two hours, of course that would increase as you spread out over the ground, probably cover more area, it might take 8 hours to raise it 3 feet. As to whether that would have the effect of cutting over the foot of the lake or head of the lake would depend on the stage of the water in the Missouri river. There would be no chance for it to cut into the Missouri river if the same was at high water. No sir, no chance, got to have the water lower. Yes sir, if this foot of the lake were cut open at or near the point marked "chute" on exhibit 48 there would be danger of that water from the Missouri river in case of high water, and that water within the channel would have to back into the lake 3 and 25/100 feet. I don't believe it is possible to cut out any chute or cut that chute out at the lower end or make any out-
154 let. No sir, I have not made any study of the amount of water that comes down from the hills or Elk creek in time of high water. No sir, I don't know what would be the average length of time that the ditch would gather up the waters of Elk creek and carry it into Jackson lake. If it would run for an hour it would raise the water in Jackson lake half a foot. Yes sir, it would rise more slowly as the water spread out over the land to the north of Jackson lake. The water in Jackson lake would have to be raised about four feet above the level as I saw them in March before they would pass out into the Missouri river. Yes sir, that would spread them out over considerable more land than my contour line of two feet indicates. Yes, it is a fact that if the level of Jackson lake were raised four feet it would cover all of Mr. O'Neill's land in the northwest quarter of the southwest quarter of section 28, every bit of it. These little marks indicate elevations above the water line.

The plaintiff's offer in evidence exhibit 48, the same objections are set forth on page 47 of the abstract, which is received over the objection of the defendants.

Cross-examination:

Yes sir, I made a survey of only a portion of the district. I made a survey of Cut Off lake. If Cut Off lake is not in the district I made no survey of any portion of the district. Yes sir, I made an examination of Pigeon creek, a portion of it from Mr. Beacom's land east about two miles, south and east, referring to exhibit 36. I examined the southwest quarter of 13 and the north half of 20 in township 29-7. In 28-8 the extent of my examination was going over the whole district in a casual way in an automobile. I was about a day going over it. I examined the matter of the
155 running into Omaha creek. That Omaha creek at the present time runs into the ditch. That not very many years ago Omaha creek had another outlet than what it has now. Omaha creek towards the outlet is put into the Elk creek ditch instead of the Elk creek ditch being put into Omaha creek. No sir I have not

examined the original profile of Elk creek ditch. No, the Elk creek ditch does not go into Omaha creek at all, Omaha creek goes into Elk creek ditch, as it is located on this plat. I said that Omaha creek goes into Elk creek ditch, do you know that there is another outlet to Omaha creek, that is what I have reference to Judge. With reference to plat exhibit 36 farther up or down than that poin in section 2-27-8, I have examined along Omaha creek from that point practically to where it enters the Missouri river at the present time around the south side of the accretion land. I went in the accretion land seven years ago, I was in there again this spring. No sir, not with reference to this, in reference to some other matter. I have not studied the water shed of Omaha creek, I know it runs on beyond Walthill, been doing some work over there. Yes, sir, it also comes back to Emerson. I don't know whether it heads nearly where Elk creek does or not. Yes sir, I know in a general way the extent of Omaha shed. I will say this, that I believe Om-ha creek will have to be widened. Yes sir, it will have to be widened and that would be all the way from the confluence of Omaha creek with this proposed ditch through to where it strikes what we call Old Omida, or the sand bar or accretion land just spoken of. Yes sir, I have traveled around there. I find there are more houses on other portions of Dakota county and more farms than in that portion. The land along there except where it is flooded near the confluence of the present waters from Elk creek and Omaha creek is in a state of high cultivation. I mean where they cultivate all of it every year and raise a crop. I couldn't point out any particular
156 piece that isn't cultivated but I could if I was down on the ground. I could show you a couple of houses that are abandoned. No sir, do not refer to Mr. O'Connor's house. If you take the road south from here (Dakota City) to Homer and go to the muth of Omidi creek you will find that the roads are not in the condition that they are to the north and west. Then the people who are farming have to travel the roads and the roads are not traveled the way they are over here and the land is not farmed in the same state of cultivation. I can't answer as to whether the Church road and the Meridian road are the roads usually traveled going to Homer. I can't say what different roads there are. I don't know the lands that are farmed or any of the land to which you have directed my attention. I cannot tell of a single piece of land not farmed—on the map I can not. Yes back from Omaha creek a number of people have fixed their residence putting their yards upon it for the use of water and have their shade trees and groves, that is true. Yes but they are back from the creek bank in most instances. I don't know whether or not in times of high water Omaha creek has backed the water clear up in drainage district No. 2 at least a mile before the waters of Elk creek get there at all. No I wouldn't say that is a fact. Never been down there in flood time. The plat does not show that in the elevation that are shown. No the plat does not show anything about high waters of Omaha creek but gives a general drainage of the land. I don't know if there was a flood in Omaha creek it would certainly flood the accretion lands

to the mouth of Omaha creek from section 2 to the mouth of Omaha creek for three miles with flat and hollow territory on both sides. I couldn't say what the elevation in section 2 is with reference to the land immediately on the bank. Water certainly runs down here in Omaha creek. On the banks of the Missouri river as they run along it is higher than it is on the banks on the bluffs,
157 that is true in any weather. Omaha creek is the highest. I haven't seen any indications of any flood. I could see on the bridge and there is a bridge down below about a mile, certainly never have been over there. I don't understand that the bridges below the Giddeon Warner's and the Meridian road have both been washed out. I am talking about the bridge that lies right south of the school house. No I don't know that there are indications that in flood times the waters of Omaha creek haven't gone over its banks into the village of Homer and down and all over the low land in section 2. That would be evidence that Omaha creek wasn't sufficient to carry any more water than it has to carry. I said you would have to widen Omaha creek. I couldn't tell how much until I figured the area. I said with reference to the fact that a ditch could be dug cheaper or as cheap as the other one that by the time you protect these banks of this ditch and by the time you protect your outlet and get an outlet into the Missouri river, it is cheaper. Yes without knowing anything at all about it other than what you have to do down there I know you have got to widen Omaha creek. Without knowing anything about these questions that I have admitted I don't know about, I am willing to make that kind of a statement and I will stick to it. I don't know as I can give you the geological formation of quick sand, it is sand mixed with water. That makes one of the best foundations that can be had for building but it runs very easily and a man getting in it will be covered up. Yes sir, that is the best description I could give of quick sand. Yes, at times it has silt in it. I don't know that I could tell the difference between silt and quick sand. If 2,500 cubic feet went down a ditch per second it would take 4 hours for the water to be raised in this lake a foot. Yes sir, I have taken levels over this and calculated the area. I think it would take about 2 hours
158 and a half if it was 5,000 feet a second. Yes sir, I think that. The estimate would be made, of course. I didn't run every contour line there was on the island over there and went back at different points and the only thing I could do is to draw my contour line through there for instance taking this line going up across starting at the north—starting in the south—the north half of the south half of section 20-29 and running up four hundred—about twelve hundred feet I find there is a raise of 6 9/10 feet. It is sandy soil over there. Missouri river sand, it is in a way quick sand, yes sir. A ditch run through that kind of sand scours and fills both—Platte river gives you a very good proposition on that. It has a fall of seven feet to the mile. You can't tell where it is—one time find it one place and one time you find it in another. No sir, I never heard of a ditch in the Platte river valley. I never saw a ditch in quick sand, I don't believe it would be dug. I said I drew

the plans of the farmers' ditch when they started the ditch. I did not say I had charge of the construction in the farmers' ditch, Mr. Wakefield was the engineer in charge. I drew the first plans of Stoddard ditch. I was in Mr. Wakefield's employ. That was my connection with it. This is the only ditch I have had anything to do with except Floyd channel.

The Stoddard Ditch was started in 1907 and the Farmers ditch and the continuance of the ditch was knocked out by some court procedure. Some decision that came from the supreme court. The water levels I spoke of are fixed as to the 28th and 29th of March, 1911, excepting the water level at the head of the lake which was the 31st day of March. On the 31st day of March I didn't see any river running into the upper end of the lake. I do not know the river ran in within 2 or 3 days before March 31st. I have been
159 told about it but it is not so. I was there on the ground to the north. I was there on the high water on the 31st day of March. No sir, it didn't get high enough in that time. I was out in the afternoon at 2.50, it would have taken about 6/10 or 8/10 of a foot more to put the water over the bank into Jackson lake. There is a peculiar condition exists at the upper end of the lake the wind was blowing from the northwest and there had been water blown into a depression that lies between the head of the lake and the Missouri river. There is a road across there and in the road there was water probably 15 or 20 feet wide and a foot deep but there was a stoppage of the water below that, there were little percolating streams in several instances running into the head of the lake and there was seepage on the west bank of the lake. There was snowdrifts still and the water going into the lake and no place was it over 3/10 deep, was just as clear as it could be and was not Missouri river water. The ice line of the lake, this was about 600 acres in the contour, the foot contour contained about 800 acres, that would be the raising of the lake a foot. As to the difference there is between the foot line and the 2 foot line I could not answer. There were 640 acres of ice, an average raise of 1 foot and there would be 150 acres more; of 2 feet I couldn't answer exactly. I never figured it. It might be in direct proportion and might not. It might vary much more raising the second time. It might be more on another foot and then it would probably decrease. The 700 foot, 1100 feet on the bank you get a lapse of elevation of 6 9/10 feet. The guage of the river on March 31st was 20 2/10. If it should raise 6 feet from what it was on March 1, 1902, it would cover pretty nearly all the ice line. I never figured the acreage of what I call high land. If it raised 6.1 feet there would probably be places the river would
160 not cover, it would be flowing down through Jackson lake. There were and would be an unusually high place that would stick out but the major portion of the land generally would be under water. In going up this 6 feet it (the inundated area) would increase rapidly, the forepart rather than the latter part. On March 31 the lake was 3.22 lower than the water in the river at 2.50 p. m. in the afternoon.. I fixed it at the head. The difference between the water in the lake and the water in the river at the mouth of the

outlet from the lake would be the difference in the fall of the river and the river falls 11 inches to the mile. In 2 miles and a half that would make a difference of probably 30 inches. I am taking it from the map. Yes sir, each one of these sections in general terms is a mile, the river outlet is almost directly north from the head of the lake. There are two chutes; there is another chute goes off in there. I unders*igned* you are talking about the chute that comes down, the water would go into this chute and be in the upper part and before it would come down. I am putting it in where the water goes into this chute. You see this is the Jackson chute goes down in there, there is another chute that goes in the outlet. Well go into this chute and go down but there is this water will *will* go into the river first. No sir, I don't know the distance from the point on the river nearest the north end of the lake from the point called Jackson lake. Yes sir, this second chute goes from the river and back into the river. Yes sir, the water flows from the west and to the east end, the lower end of the chute is the east end. When I made this survey I couldn't make it any place else than on the ground on this chute. No I didn't go there while I was making the survey. Do not know what the conditions were at that time. I was over there in February and I was there last Sunday. There was ice there in February. In
161 spots it was not covered with ice entirely. From where the outlet from Jackson lake flows into this chute is about half a mile. Yes sir, I have outlined with a yellow pencil (exhibit 48), approximately the position of the chute which starts from the Missouri river and runs back to the Missouri river and which counsel has described as the northwest chute for convenience. From the point at which the outlet in Jackson lake strikes that chute to the water line of Jackson lake it is now about half mile from the ice line, maybe 4,000 feet. When the river was raised to a state of 11.5 feet I think that Jackson lake and the Missouri river will be together, at the northwest end and probably at the southwest end both the inlet and the out let. I would not say flowing through the lake but the river and lake would be at the same level. There might be a movement of water, but I don't think the full channel would be in there at that time. In taking levels I used the ice line in February and in March I used the water line and made connections, tied up with my levels I made in February and have used that as a basis. The stage of the Missouri river was represented as 100. I used the river as a basis of 100, and then ran a line of levels across the lake. The stage of the river if 10.2. Yes sir, that would represent 100 on my levels, that is about that. The river, I believe was 9.9 the day before and 8.8 the day after. The last page of exhibit 49 as to the stage of the Missouri river at Sioux City, I couldn't say as correct unless you would let me check it up. It checks with what I have.

The defendants offer exhibit 49 as a part of the cross examination. It is admitted that if G. W. McDowell were present in court he would swear that the statements set forth in exhibit 40 were made

by him on the dates and each of the dates said exhibit pur-
162 ports to cover were correctly made at that time and that they correctly show the stages of the Missouri river at Sioux City, Iowa, at the Combination bridge just about 7 miles from the head of Jackson lake and 2 miles from the foot of Jackson lake. The plaintiffs object in addition to the objections heretofore made for the following reasons: That exhibit 49 is not an official document and is ex parte, it is irrelevant and immaterial, the observations professed to have been taken on the opposite side of the Missouri river where the channel strikes the Iowa side at a distance of about 12 miles from the head of Jackson lake and probably about 7 miles from the foot of Jackson lake. Objections overruled.

In connection with my datum the elevation of the Missouri river on March 31, 1911, was 103.22 feet. The Highest elevation I have taken is 106.9, I think 106.9 above the datum plain. Yes sir, by the ice line I refer to the land lying north and west of Jackson lake. Yes sir, what we term made-land. The Missouri river originally ran around Jackson lake. Yes sir, it changed its channel by reason of a cut off to the north of it, that is what made Jackson lake. Yes sir, the difference between the river on March 31, and the highest elevation I took was 3.7 feet; not on the lake, on the high land north of the lake. I don't know where the ditch that is known as the Elk Creek Cut Off is located from the ground. I know from the plat. I don't know exactly where the ditch is from anything that is on the ground, I am unable to locate the outlet of that ditch within from 1200 to 1400 feet from any particular point. I can scale it on the plat. I cannot locate it on the ground, no sir. My
163 borings are in the state of Nebraska and they are between Jackson lake and Cut Off lake. No sir, I don't know whether the water in Jackson lake was in a high or low stage. I have been up the Elk creek. Yes sir, know its general character. I couldn't answer whether Elk creek has a fall more than that of the ditch, no I wouldn't say that it is not so. From the point at which the ditch starts down to where Elk creek last strikes the ditch, the fall is greater than the creek. The creek is a great deal longer distance around and, of course, the natural drainage of the creek in the distance, that is what you would call a grade line. A straight ditch will cut worse than a crooked one, because the velocity is greater. Other elements in the cutting are the character of the soil and the height of the water, the Missouri river cuts when water is receding. I don't know whether cross currents have anything to do with the cutting. If it flows one way a short distance and starts another way it will certainly cut at the bend. Yes sir, I said on direct examination that there would be no possible way unless the railroads raised their tracks at the point near where the ditch turns to run to the north in which they could *levy* up or stop the water from flowing to the southwest in case it was greater than the capacity of the ditch. I couldn't make any survey of the ditch line at all or of any proposed ditch there. To raise Jackson or Cut Off lake one foot would require 34,848,000 cubic feet. The acreage I took as 800 acres. That would be practically one foot on the contour foot outside of the

ice line. I didn't say anything about loess soil, no sir, I don't know anything about that. The exhibits in glass are numbered. No, I didn't say that where a stream ran into the Missouri river it wouldn't erode. In the majority of streams going into the Missouri river there is a sand bar forms at the mouth of the stream and stops the flowing of the water. You have it here in the Sioux river, you had it in the old Floyd channel and in most
164 of the rivers up and down, and you have it in the Jim river at Yankton. There never has been any bar formed in front of the Floyd channel, whether a bar will form depends upon the current of the Missouri river. There is no question about it. I don't believe there is any erosion at the mouth of the Jim river excepting as the Missouri river erodes. No sir, I do not know of any stream within 100 miles of Sioux City along the Missouri river which erodes its banks at the mouth, generally the stream backs up. Yes sir, the water backs up and stops action of the water at the mouth. I said there was danger of the Missouri river backing up into the proposed Elk creek ditch. If the water backed up and you had a heavy rain fall up the Elk creek ditch and the tributaries up Honey creek you have used up a big portion of the area of your waterway. The water would certainly get out some place. If there was 5 feet of water back in the ditch and you are holding an area way of 3600 square feet and you fill it up 5 feet you have certainly reduced the areaway for that waterway that much and if you are figuring on taking care of 1200 feet of water it has got to spread some place, it will go over the ditch. If the level from the Missouri river is 5 feet below the top of the ditch it will still go out over the ditch if you have flood water up at the head waters of it. It will flow over just the amount of area you have taken up by your back water. The waterway of the ditch as proposed with the 30 foot bottom and water 12 feet deep is 504 square feet, if you have got that ditch filled with 5 feet the areaway you take up of that is 175 square feet and you have 329 square feet left, the water has got to go some place; that 504 square feet has got to go some place. I don't think it will all go out of the mouth, probably 80 per cent will go out. Yes sir, with the river level at 5 feet below the top of that ditch. To produce the velocity of 8 feet per second in a ditch like we have got here, carrying 12 feet of water on a 6 foot grade,
165 I cannot tell. A ditch does not dig out at the bottom at all, it digs at the sides. There is no ditch digs at the botom. If there is quick sand it will wear out the quick sand around the ridges and then the sides will drop in. Yes, I have had experience in this ditch work. Yes sir, in the Floyd channel. At 19 feet we struck quick sand and it is falling in at the side. Yes sir, it is eroding now. I couldn't say to what extent because it has been 7 or 8 years and it has probably gone out in one place. 50 or 60 feet just above the northwest bridge and it still continuing. Yes sir, Floyd channel was built to clean a channel, to clean out the old Floyd channel which was very stagnant. Yes sir, it was a relief proposition. The dirt was taken out with steel scrapers in the first part, in the next part some was taken out by hand and the balance blasted out. I

think there was some loose stuff in the bottom of the ditch. Yes this loose stuff is in the Missouri river now, it has gone down.

Redirect examination:

I made up the plant for the Floyd channel. After the plans were made up Major Chittenden who had charge of the river, sent word to Mr. Lewis, city engineer, that he wanted to know what they were going to do at the mouth of the Floyd channel, and Mr. Lewis sent me there with him to show him the plans and to show him the protections that were going to be in there and he approved them but said he wouldn't permit any opening in the Missouri river wherever they had done any work without being approved by his department. There is a little swamp land north of the Omaha road. Judge Evans spoke of a raise of 6.10, 6 feet and 10 inches. 6.1 is the way it is on there. Yes sir, that would make the gage of the river at that time 16.3 above low water mark. Yes sir, he asked me if the water at that height would flow into Jackson lake. I say it would at the head.
It will flow in at about 11 feet. On March 31 the water in
166 the gage at the combination bridge was 10.2. No sir, I couldn't say what it was at the head of Jackson lake. I was up at the head of Jackson lake that day. There was some little streams flowing.

Recross-examination:

The gage at Sioux City would show the raise and fall. Show the difference in the 24 hours as to whether it had fallen or risen in the river.

Mrs. ELIZABETH LEAHY on behalf of Plaintiffs testified.

Live in Jackson; own a piece of land near there. My land would be about here (indicating on exhibit 48). The southeast quarter of the southeast quarter of section 25. Yes sir, at the white mark on exhibit 48 that quarter of 48 acres, is the 40 I refer to. Yes sir, I own that. Yes sir, cultivated land, no house on it. Yes put crops on it. No sir, not grass land but tillable land. Yes sir, I owned that on September 4, 1909 and on October 23, 1909, both before and after. No sir, no person ever offered to make any agreement to purchase a right-of-way across that land. Neither any officer of the drainage district, or agent, or attorney. There has never been any stakes nor marks indicating a survey across the land that I have seen. Yes sir, I have been on the land. I have never seen anything there to indicate that anybody has surveyed it. No stakes or any holes dug. Yes sir, have lived in Dakota county a good many years. Yes sir, know Elk creek up above Jackson. I don't know just where Honey creek is. Yes sir, I know whether that valley floods or not.
I have observed it for the last 5 or 6 years I imagine. Yes,
167 I know it flooded. Yes, I have seen it flood from bank to bank clear across. Yes sir, I know the value of this piece of land. It would sell for $150.00 per acre. I have not received anything from this drainage company, or any proposition. No sir, I

have no idea how much of my land they will take nor where they will take it. I do not know anything about where the proposed ditch is. No sir, nothing to indicate how much they will take.

Cross-examination:

Yes sir, I am the wife of Dr. B. J. Leahy. Yes, he and I talked about the drainage district wanting to have a drainage district across this piece of land. Yes sir, he told me that he had been asked by R. E. Evans as to whether or not a settlement could be made between them and me. No sir, we did not discuss it nor it was not talked of. No sir, the doctor didn't report any conversation which he had had with R. E. Evans. I did not know until last Monday that the offer was made. I had not authorized him to look after this matter. There had never been any such agreement between us. I don't know if there has ever been an understanding between us about that. There was not.

Redirect examination:

No, Dr. Leahy was never my agen- for this land and never had any authority in connection with it.

Recross-examination:

The land has not been rented of late. I farmed it myself. The hired men manage the farming. Yes, the doctor helps. He helps me, yes. Yes sir, what he says is what goes as a rule. Certainly I have confidence in his judgment. I do not think he makes bargains without having consulted me first, when it is about my own property, I mean. Yes sir, the doctor has property of his own.

168 Dr. B. J. LEAHY on behalf of the defendants testified.

I am Dr. B. J. Leahy of Jackson, husband of the witness who has just testinfied for the plaintiffs. Yes sir, had some conversation with R. E. Evans during the year 1910 with reference to the right-of-way through the land owned by my wife.

"Q. If it not a fact Dostor, that you were asked by R. E. Evans to see the parties who owned the land close to your wife, being her brother-in-law Heffernan and Mr. O'Neill so that a settlement could be made?

A. I have no recollection of being asked to see them in regard to a settlement.

Q. Well did you not, following that, write a letter to R. E. Evans in which you said that a settlement could not be made and R. E. Evans would understand the reason why when he came to talk to the parties?

A. Yes sir, possibly I wrote that letter. Well I would not deny that the letter was written pursuant to the conversation just referred to, I would not say it was not. I remember having a conversation with R. E. Evans but I don't remember C. K. Feffernan or Harry O'Neill were present at the time. I remember R. E. Evans made the offer, I think $150 an acre for this land, I don't think

I accepted it, I think I said I could not accept it. I don't remember what I said with reference to the necessity of going to see my wife, or whether I represented her in that matter. I don't remember what I said. I don't remember whether R. E. Evans asked me at that time whether or not it was necessary and whether I represented her. I don't remember having any conversation with her at that time or about that time. I have not said that I did not tell you, I say I have no recollection of Mrs. Leahy's name being mentioned. I refused your offer, that is all I remember of
169 the conversation. You told me you came to make an offer for that land that your offer was $150 an acre and I think I told you that I could not accept it. I don't remember you asking whether it would be necessary to go and see Mrs. Leahy or whether I represented her and of my saying no it would not be necessary. I would want to be understood now as swearing that I had no authority to represent her. I never felt I had any authority to dispose of any part of her land. She never gave me any authority to represent her.

By Mr. EVANS: At this time the defendants disclaim all interest or right to the land standing in the name of Elizabeth Leahy by virtue of any proceedings heretofore had, or any action heretofore taken.

By Mr. ALLEN: The plaintiffs at this time, in view of the action of defendants' counsel in disclaiming any interest in the land of Elizabeth Leahy, or any right to cross it by the proposed ditch——

By Mr. EVANS: If that is the understanding I did not put that in there. We propose to cross it, but in reinstituted condemnation proceedings.

By Mr. ALLEN: Under the so-called condemnation proceedings thus far had we move the Court for judgment against the defendants for the following reasons:

First. Because the condemnation proceedings are an entirety and being void and abandoned as to the land of Elizabeth Leahy
170 are not good or binding upon the land of the other plaintiffs and the defendants, the Drainage District No. 2, so-called, and its board of supervisors cannot institute a condemnation proceeding in piecemeal, but the condemnation must be valid in toto or void in toto.

By Mr. EVANS: I do not think there is anything in the proposition. You think it is good. We have been leaving the whole matter to the Court in this way. I think I can institute an action to condemn each piece.

By Mr. ALLEN: Well, all right.

By the COURT: Then I will withhold the ruling.

No ruling made.

HENRY W. O'NEILL on behalf of plaintiffs testified.

Am one of the plaintiffs; age 53, live at Jackson, Nebraska. Have lived in Dakota county 53 years. My land is right around in here (indicating on plat, exhibit 48.) It is called lot 3 and 5 of

section 28, township 29, range 8. There is 153 acres in it. Have owned that land 27 years. I have occupied it 27 years. Well there was about 5 years ago something to indicate a survey or location of a survey across this land, but not lately. No sir, not in 1909 and 1910. The old survey was by Holmvig and some other gentlemen. Yes sir, for different parties. No sir, nobody connected with this transaction. I never saw any survey marked out upon my land since that time. No sir, there is nothing different in my land or Mrs. Leahy's land or Cornelius Heffernan's land from the land immediately above or below it. No sir, there is nothing
171 across the land there to indicate any survey. Yes sir, I have been over there recently, there are some trees there, no marks on the trees or anything of that kind that I ever saw. We were over there when the boys were surveying there. Yes sir, I know that lake that runs across my land. There is water in it. No sir, steam boats don't run along there. I have known that country 53 years. It has been a lake 15 or 20 years. I don't remember the year it cut out. No sir, never seen any steam boats running down there. It has been a bayou or lake all that time. There are some farms on the lake at the side of the lake south of it and west of it, part of the farms on one side and part on the other. There was some fencing in there a couple of years ago, or three years ago, Ellen McHenry got some land and fenced it in. Yes sir, came up to my land on the north side of the lake and stopped there. Yes, between the lake, north of the lake and this north chute is occupied by farm land. Rouse farms some there. There is quite a lot of land. Quite a bit of alfalfa grown and there has been for quite a good many years. I never saw any mark anywhere on my land along this lake front to indicate the location of a survey. We looked for it once over there this spring. Yes sir, I am some acquainted with Elk creek, Fox creek and Honey creek and other creeks that flow into Elk creek up along towards Panco. I guess I have known Elk creek ever since I was a little boy. Yes sir, have seen it flooded frequently. Quite a lot of water comes there, pretty near from one year to another, sometimes twice in one year and then for a couple of years there would not be any. I don't really know how far it is there from hill to hill. Yes sir, all of half a mile, places further than that. Yes sir, the water according to the lay of the land would either have to come down through the proposed ditch or go down the Elk creek into the valley. A half a mile west of Jackson, Elk creek has good banks. No sir, there is no valley south.
172 That is a part of Elk creek valley.

"Q. They run up the Elk creek?

A. Yes sir.

Q. To get this water before it gets out on the valley?

A. Yes sir.

Q. And take it across through this ditch and throw it on your land, that is about it?

A. Yes sir.

Cross-examination:

I don't know how long ago the Missouri river ran around Jackson lake, it must be about 27 or 28 years ago. This lake was then a portion of the channel of the Missouri, when it changed there was a cut off made and that left what we call Jackson lake.

Redirect examination:

No sir, no person before the institution of this so-called drainage proceeding in 1910 ever applied to me or agreed with me upon a definite point of locating a ditch across my land. Yes they made an offer on the land as fenced off. He had a map drawn and that is where the ditch would be and he made an offer on the land. Judge Evans came up one day to make a settlement and asked what I wanted and I said $20,000, the judge thought that was too much, but made an offer of $150 an acre for, I think, about nine acres. He did not specify that only just by the map, all he talked about the land was the map. He showed me where the land was, just with the map. No he did not point out on this land any point they wanted to cross, he unrolled the paper and showed there where they went, that is as far as I ever looked at it. He said it ran into the lake. No he did not designate any point where he would enter the land or where he would end, he said it was running to
173 the lake. I don't remember that he designated any place, that is all I remember.

Cross-examination:

Yes sir, the conversation with R. E. Evans was in the village of Jackson. I could not say whether exhibit 36 is the same piece of paper. I think it was a blue paper. I could not say for sure. I would not say as to that Judge, I did not take notice of the paper. You said that is where it ran and that is all the attention I gave to it. You said that is where the ditch went. Yes sir, I was shown those lines, you said that is where it went. You went and rolled up your map and went off there and sat down and tried to tell me $20,000 was too much. Yes you said you could not give the $20,000. You said you would have to make an offer in order to take it and then you said you would make an offer and made it of $150. I don't know what for, you said damages. It was for going through and damages or something. I don't remember whether damages or just for the land. Yes sir, I refused it.

Redirect examination:

No sir, Judge Evans didn't offer me any money at that or at any time. No sir, never tendered me money. The conversation was up in Jackson in the drug store. A little better than three quarters of a mile from my land. We did not go out to look at the land. He did not designate any part of the 40 acres he wanted only by the map. No sir, did not point out on the land itself. I know nothing only what he said was on the map.

Recross-examination:

Yes sir, I was told the width of the right-of-way, it was to be 200 feet wide.

Redirect examination:

Well, I think a man could get $175 an acre if he wanted to sell it, for the 300 acres.

CORNELIUS HEFFERNAN on behalf of the plaintiffs testified:

I am 50 years old and live right close to town, north of Jackson; have lived there since I was a boy. The land marked Cornelius K. Heffernan on exhibit 48 is my land, 220 acres all told, all lying together and all used as one farm. Yes sir, I know what it was worth during the summer and fall of 1910. I am sure I could get $200 an acre for it. No sir, there is not nor has there ever been anything on this land to indicate a survey. No stakes or monuments or signs. Yes sir, I have seen a road staked out. There has never been any stakes like that there that I know of. I have no knowledge only from the map where they propose to put that ditch on my land. No sir, nothing on the land itself to indicate where they are going to enter or where they are going to leave. Mr. Evans came up to see me one day and wanted me to come to town and I came down to Jackson. We met in the drug store. He took out a map and said he was up to try and make a settlement. He wanted to know what I would take for that right-of-way. I told him $10,000. He said that was too much. He offered me $150. I told him I would not take it. No sir, he did not offer me any money, nor any check, or draft. That was about all that was said. We were maybe eighty rods or such a matter from the land. No sir he did not designate where the drainage district wanted to go on this land nor any post or monument, nor any place of exit where they went out. My north line is over half a mile long and the south line three quarters of
175 a mile. He did not point out any place of entrance on the south line nor any place of exit on the north, he said the ditch was 200 feet wide. He pointed it out with his pencil on the map. I know about the flooding of this land by Elk creek. Yes sir, it gets out of its banks about Goodwin and stays out all the way down. Goodwin is five miles or five miles and a half up.

Cross-examination:

I don't think Harry O'Neill was in the drug store the day you and I made the talk there. He might have been around close by but I did not see him. I think the druggist was there. You showed me something similar to exhibit 36. Yes sir, called my attention to the cross section where it ran. You called my attention to it about the width and the direction. Yes sir, something like exhibit 36, I think it was a blue one if I am not mistaken. Yes sir, otherwise exhibit 36 is what I saw. Yes I understood what we were talking about. Yes sir that you were trying to make a contract for a right-of-way across my property along the line that was plat-ed on the map we were looking at.

Redirect examination:

No sir, Judge Evans did not attempt to agree with me upon the actual point of entering the land. No sir, we were not there, never went near it. No sir, did not talk about any point where it should leave nor about the manner of its crossing there.

Recross-examination:

No sir, we did not go out on the land itself and locate a spot and talk about that. Yes as shown on the plat we talked about the right-of-way where we thought the right-of-way might be. It was shown to me as marked on the plat.

176 Redirect examination:

No sir, I don't know whether that was correct. Judge Evans did not tell me he would like to have this ditch enter my land so many rods east of where it goes up to the side of Jackson on the south, nor anything of that kind. He did not locate it by monuments or stakes, nothing of the kind mentioned at all.

CHARLES GOODFELLOW on behalf of the plaintiffs testified:
Live two miles north and west of Jackson; am 25 years old. I live on the east side of Jackson lake. I live west of the lake on the hills and I farm on the bottom. I own land east of the lake and west of it and a part of it is in the lake. I am familiar with this country over north or east of the lake. I have known it ever since I can remember, was born there. That country is all fenced up and taxes paid on it, some in pasture, some meadow, some in crops, etc. Yes sir, houses and families living there. That condition has existed since 1894 or 1895 and existed in 1910 and up to the present time.

Cross-examination:

In the spring of 1910, just after the ice went out, the land I have spoken of was flooded. I could not say that all of it was covered, there is a large portion was not and there was no current down through Jackson lake. Of course it had to flow in and had to have a current. There was such an amount of water in the river and the channel ran along the bank at that time, that it would force it over. It had to run in to fill the lake. I could not say it went through the lake, I was there the morning it ran in. Well there is considerable land that was not covered, there was hundreds of acres, probably.

177 Redirect examination:

It does not run over into Jackson lake now. It flowed into the southwest. This swale which intersects Jackson lake a quarter of a mile or more below the head of it has trees in it, about 15 feet high. They cut them all off once and we have a meadow in there. There is an accommodation road across out there traveled considerably. The river strikes the bank considerably east of the head of Jackson lake, now it has changed.

T. H. SULLIVAN on behalf of plaintiffs testified:

Live two miles north of Jackson, have lived there nearly 41 years. Yes sir, was there in March 1911. Am acquainted with Jackson lake and with the north end of that lake. Yes sir, the lake is in sort of a circular form. I was out there on March 31, last. Yes sir, it was high water in the Missouri river. I believe it was the time of the highest water. I did not go to the bank of the Missouri river, I went to the head of the lake. I do not know as the waters of the Missouri river were running into the north end of Jackson lake, there was some little small streams of water coming in there but I could not say whether they were coming from the river or not. They were probably from 1 to 3 or 4 inches wide and probably an inch deep. It was mostly clear water. Yes, there was snow melting and it was rather a warm day. I never saw any real clean water running down the Missouri. There was snow there, it was melting on March 31. I do not know whether those rivulets were formed by the melting snow, they were partly formed by that and might have been entirely formed by that.

Cross-examination:

It would not have taken much of a rise at that time for the water of the river to go into the lake. I wouldn't say positively
178 whether any part of it was from the Missouri river, it might have been. I do not think it was directly from the river at that time, it was clear. My opinion is, it did not because I did not see any water running over the banks there.

Redirect examination:

I would think the main channel of the river from the head of the lake at that point would be somewhere in the neighborhood of three quarters of a mile or possibly a mile.

Recross-examination:

I do not know exactly how far the water in the Missouri river was from the lake on March 31, it would be close to a quarter of a mile. Yes the water ran over there in 1910 practically all of the lake was covered. There was some water running all through the lake at that time. Yes sir, logs floated in there, carried drift around in through the lake. Well, I just go down to the lake occasionally.

Redirect examination:

In 1910 the cause of the water flowing in from the Missouri river was that we had unusually high water. It does not go in there very often, no.

Recross-examination:

It was in the spring of the year 1910 that I allude to, it might have been in February, I believe it was in March or April. It was while the ice was going out. It was from the up river ice.

Redirect examination:

Yes it came in from the lower end of the lake first and when it got high enough it would come in from the upper end as well, ordinarily the water backed in through the lower end. North of the north end of the lake going up to the river you do not strike the main
179 channel of the river, it is forming another lake up there. Has been for the past year. The water I think is moving but the main channel of the river is not there, it is a way below there.

Recross-examination:

Yes sir, the water usually backed up into the lake. I could not say as it backed up once or more times each year. I know that the lake did rise in the spring last year. I do not know that it rises in the June raise. I do not know whether after the river goes down there is a constant flow out of the lake until it gets down to Jackson chute. Prior to last year the current of the river was right in there where the river is cutting the new lake. Yes sir, it is from that place that the water flows through into the head of Jackson lake.

Redirect examination:

Yes sir, there is a swale coming down there. It goes in a curve and the main channel is not there, it is still water there. Well there are several trees in this swale and a road crosses it. Yes sir, could cross it at that time on the road. Yes there is a road along there and a part of it washed in there. It is high land and there is high land until it gets to the bar. I think as the river is now it is all of a foot from the top of the bank down to the water if not more, on the bar it is not that high.

Recross-examination:

The high land and the bar connect near the head of the lake. All of the land east of that point and north of Jackson lake is what we call sandbar lake. Yes sir, that is what the river flowed over within my recollection. I do not know whether in 1910 all of this land was covered with water from the Missouri, there was a
180 large part of it. I was where I could see everywhere. Well it is a part out and close to where the buildings stand there in a space there, I do not know how much was covered.

Redirect examination:

By sand bars being at the head of the lake I mean land which has been made by the river. Yes sir, a sand bar between the lake and the river. A part of it is covered with trees and vegetation. You might call it a part of the main land, I suppose if you want to, it has been there more than thirty years. Yes sir, cultivated land runs right up to the road. Yes sir, there is a sand bar forming out in the river where your pencil is (indicating). Yes sir, several hundred yards. That is a new bar. Some of it has been there thirty years and some ten and some one. No sir, I have not seen a steam boat down Jackson lake in thirty years nor a vessel of any kind excepting a skiff or one of these gasoline launches.

Recross-examination:

I remember when the river used to run around Jackson lake, yes sir the current or channel of the river used to be along the bank where Jackson lake now is. I have been told that there was a cut off to the north or northwest made suddenly and that created Jackson lake. I was small at the time but I have been told that was the fact.

JOSEPH A. HALL on behalf of the plaintiffs testified.

I live in Jackson, have lived in Dakota county since the fall of 1886. My farm is there (indicating on exhibit 48). My wife owns a quarter called the Ellen Hall land. I do not own a quarter, 40 and another little piece I bought in there since. I know
181 Jackson lake, have known it for 24 years. Yes, I know the country west of the lake and north of the lake. There are small pieces of land that is pretty poor but there are hundreds of acres of very good land in there, cultivated in corn, alfalfa and sugar beets. I have not been there lately. I understand they laid out a public road across that same piece of territory this past spring but I do not know exactly the location of the road. Yes sir, clear along the foot, clear down to Mr. Wagner's. They go through on that piece of land through to the east to the chute and cross the chute I think somewhere down here (indicating). Between the lake and the river is where the public highway is. They have been using it as a public highway for years but I do not think it has been laid out until recently. Where the land is not cultivated there are trees in there, thirty feet high, I should think. About ten years ago the people of Sioux City used to go out across that chute and up on that bar and haul wood there all winter.

Cross-examination:

There is no road across the lake. There is a road just north of the west end. Now there is a road over there (indicating) that runs across here, it is between the lake and the river. I think that was just established recently. They used to travel through there though, they have been traveling through there for years. No the timber people used to go through there. I think it was not laid out until this spring. I would not call this land a sandbar, there is lots of gumbo, excellent good land. It has all been washed there by the Missouri. It is made land, so far as that is concerned this is made land right here. Yes, I see the meander line (referring to plat). Yes sir, where it has not been disturbed you find a high bank all along the Missouri river unless there is some draw or swale into it. There is points of land and high land that was never cut off. Yes sir, that would be like the other high land. I know there is
182 good solid land. Yes sir, I know how the river makes accretion land. Yes sir, as a matter of fact the river course was run into Jackson lake by cutting. Yes sir, the bank on the other side did fill up with a sandbar.

Redirect examination:

I couldn't say as to when it was made, some of it was there when I came and I think there was timber on it when I came there.

Recross-examination:

I know there was timber on it ten years ago, because I saw them selling it. I think the timber grew there since the cutt off except on that point there, there was not much on that point. It was all on this low land. Yes sir, it has grown since the river changed its channel.

Redirect examination:

The greater part of it is in good heavy timber except where they are raising alfalfa and corn. They raise hundreds of acres of alfalfa there.

It was here stipulated that the defendants will, unless restrained, construct a ditch as shown in exhibits 36 and 37 except as to the land of Elizabeth Leahy and as to that land they will make no such attempt until they shall have acquired it either by contract or proper proceeding, but the defendants do not claim to have any right to enter upon any of the land until they shall have paid to the county judge or the parties, the amounts awarded in the condemnation proceedings.

It is admitted by the plaintiffs that the maps and profiles shown to Henry O'Neill and Cornelius K. Heffernan were accurate copies of exhibits 36 and 38 at the time of the conversations had
183 relative to the settlements.

*Defendants' Testimony.*

JOHN HICKEY on behalf of defendants, testified:

Am farming living part of the time in Jackson and out on a farm the other part. Am acquainted with Jackson lake and also with the land and river north of the west end of Jackson lake. I heard the water was going through there and I went out to see it on a Sunday in the spring of 1910. It was the latter part of March or April. There was a good stream of water going across the river right there through the lake. It was coming right across here (indicating on plat), right across here (indicating by putting a pencil right from the Missouri river down to a point below the head of Jackson lake). The river was not over a quarter of a mile away from the lake. It was covered clear across that I could see. Drifting wood and old trash. That side of the bank went down right through there (indicating) out north of the lake. That is a sandbar with the exception of a little high bank to the northwest of the lake. Why they use that for pasture and farm it a little and raise alfalfa on it. Yes it is known as the Record Company Ranch. The S. B. Cattle Company is a part of it. I could not see whether in the spring of 1910 any portion of that land was covered. I could not say for the willows,

I was in a boat. Well it would not be quite half a mile from the head of the lake to where I started. Yes sir I know whenever the river rises the lake rises some. And when the river goes down the water kind of seeps out again. I am acquainted with the outlet, the water used to flow through that outlet when the lake is high. There used to be a chute that takes water from the river and carry
184 it back to the river. I don't know whether it is there now or not. I have been familiar with the lake about 15 or 16 years. I used to skate and hunt on it. Some years the lake would be up where the river raises and when it went down there wasn't much runway; the lake was kind of lower a little. I dug a well east of Jackson two miles, I think that would be a little south and east. No I never dug any wells on the land of C. K. Heffernan or Mrs. Leahy or Harry O'Neill, or Mr. Berry or Mr. O'Hanlon. I was at the lake last year. It is just about its medium stage. Sometimes it raises probably a couple of feet higher. It was very low last winter. No sir I have never seen it much lower than it was last winter.

Cross-examination:

Am 37 years old. Yes sir, married man. I live 13 miles north of Jackson on a farm. I go out and come back to Jackson. I go up north. Yes sir, the bluffs are north of Jackson. I go right along the foot of the hills. My farm is on the bank of the river. The farm I am on would be a little over 320 rods from the bank of Jackson lake. Northwest of Jackson lake. I went fishing, that is how I came to go down to Jackson lake last year. Tom O'Brien asked me to go. No sir, I got no request from any one interested in this question to go down fishing. No the water in Jackson lake is not very pure. Yes sir, it is different from the water in the Missouri. Some of it is muddy where it comes from the dump pipe. When the wind blows it gets roily. In its natural condition it is clear. About a year ago I saw the water come in from the river, it was on a Sunday. No I couldn't say for sure whether it was March or April, nor the day but it was Sunday. Yes sir, I had known the water to come in there before, it went all of that whole country before. Yes sir, years and years before.

"Q. You do not pretend to say that it has been a yearly
185 occurrence for the Missouri river to flow into that lake?

A. To back in but not cover all of it." Why some of it ran in this year, yes sir. I saw it, it ran in from the north along where this road used to run down from the northwest. Yes there is a road running east and west between the end of the lake and the river to the river. There is no public road there. It is a traveled road. I don't know if automobiles go through there. Right in there (indicating) the land is low land. Yes sir, that is low land. There is a built up flat there (indicating), it is not as high as the other side. It is not high land when the water runs over it. Yes I know right where there is a cultivated field between this to the west. Yes sir, there are some trees where that field is not cultivated. Yes, west of that point you come to a little swale. Yes, that goes from the river and strikes the lake several hundred yards below the head

of the lake. Yes filled up with trees and brush, in places trees 13 to 20 feet high. I said in places there was trees. Yes sir, cotton woods as large as my head. When I saw the water down there that spring I was down there hunting. Nobody was with me. I did not tell anybody about seeing the water there. Yes sir, I was subpœnæd. I did not tell anybody what I had seen. Yes sir, they just guessed at it. I did not tell anybody. There is no large grass out there between the river and the lake. Right along the bank of the lake it is all farms there. East of this bank here (indicating) there is a higher bank to the west. Yes, east of that it is a little lower, some of that land is in trees and grass, there is some willows in there right up to the water's edge. I never measured the trees, I would not say either way, no sir. I didn't see grass matted down and new grass growing up through it if it is there. I saw that point last about a month ago. When the water runs into it the lake raises two feet.

186 No I never measured it, well kind of guessing I judge from the way it looks up on the bank. Yes sir, the north side you can find where the trees is where it is lodged in the trees along there. Well I never measured how far from the edge of the lake. I do not know whether it is there now or not. Yes sir, all along from the head of the lake down for several hundred yards the-e are trees around there on the west. No it don't go clean to the river. Oh I have been in the neighborhood of Jackson pretty near thirty years off and on. No sir, never saw a steam boat on that lake since I was old enough. I don't know whether the entire high land is crossed by roads. I have not seen bridges and dykes, it has been a couple or three years since I have been on this end. Well I admitted that all the high land except where there are a patch of wood land is under cultivation. Yes sir, it is most in that lake.

ROY N. TOWL on behalf of the defendants after qualifying as an expert civil engineer, testified:

The Towl Engineering Company is a partnership in which Harry Nelson and myself are the partners, and our company is employed to superintend and do the engineering work for Drainage District Number Two of Dakota county, Nebraska. I took an engineering course at the Armour Institute of Technology at Chicago. This is recognized as a standard institute for the purpose of teaching civil engineering and surveying. I started the study of engineering fifteen years ago. My father was an engineer. In the winter of 1898 I went into field for the Union Pacific Railroad Company in Wyoming. The following year I was employed as division engineer in charge of construction in the Pan Handle of Texas on the El Paso line. Just prior to that, I had several months' experience as instrument man on irrigation projects in the western part of the state, and also acted as an instrument man on an extension of the Rock Island in Iowa. In 1901 I attended Armour Institute. In 1903 I

187 was employed by the Illinois Central. I finished the course there, had railroad experience, as stated before, in engineering before. I was employed as an engineer by the Illinois Central in South Illinois, Mississippi and western Tennessee. The South

Illinois was in connection with the drainage of the railroad's property, being in the low part of the Mississippi Valley and running and connecting a line through the Eads bridge. In 1905 I went into private practice with the firm of Rosewater & Craig. Mr. Rosewater was city engineer at that time. My work for the last seven years has been general engineering work, involving water power and irrigation, sewerage, drainage and interurban railroad construction, and since that time we have had charge of fourteen or fifteen drainage projects.

At the present time, we are connected with ten drainage projects as engineers. They go as far south as Kansas City and most of them in Nebraska on streams tributary to the Missouri river, the Logan, Nemeha, the Papillion creek and the Elk Horn, the Platte river, and work on the Missouri river valley itself, and this work on the Elk creek and Pigeon creek. In connecting with the drainage work, we made a special study of conditions from Minneapolis to Oklahoma, in six different states. I am a member of the Iowa Drainage Association, and have given special attention to the capacity of ditches, character of watersheds and the elements entering into the design and construction of the ditches and the effects that have resulted therefrom.

In recent years the principal work of the Towl Engineering Company has been in connection with drainage workings. The magnitude of these drainage projects has ranged over projects costing from $30,000.00 to $250,000.00. The projects bearing similarity to the one in Dakota county are in the vicinity of Tekamah, Herman, Blair, Council Bluffs, Kansas City and the outlet of the Nemeha, near Rulo. The similarity consisting in the discharge of
188 drainage ditches upon the bottom of the Missouri valley from tributaries debouching from the hills. And draining watersheds of more or less extent in valleys tributary to the Missouri river. The projects on the Platte river have outlets through a sandy soil and the same applies in the Elk Horn river where conditions are somewhat different than they are here on the Missouri river on account of the character of the sand. That is different and the watershed is different, but especially between Tekamah and Blair and in the vicinity of Council Bluffs, the conditions are very similar to what they are here. Taking the one which is the most strikingly similar would be at Herman between Blair and Tekamah, where the York creek, with the same similar watershed, has a delta where it enters the Missouri river bottom and has built up the outlet of the stream something in the neighborhood of twenty feet above the general level and has spread the flood waters out in the swamp below.

Exhibit 36 in a map of drainage district No. 2 prepared by me and Mr. Nelson covering the system recommended by me. The facts there set forth are correct. Heavy blue line surrounding the name shown on the map and the subdivided line is the boundary of the district. The two solid blue lines represent the boundary of the right-of-way and the dotted line between the two heavy lines indicating the center line of the ditch represent the route of the

main Elk creek ditch. The figures between the line indicate the acres taken in each 40 acre tract. The red figures inside the ditch boundaries indicate the units of benefit proportioned against the various tracts. The names written in the subdivision are the owners. The small inclined numerals indicate elevations. In fixing these I believe we used an assumed datum. I think Mr. Nelson could answer that question. The single blue line under which are the letters C. B. & Q. R. R. indicates the center line of that road.

The line marked C. St. P. M. & O. R. R. indicates the center
189 line of that road. Cut Off lake is shown by parallel lines above that. Other parallel lines with the word chute represents a flood chute of the Missouri river. The parallel lines in various places over the map indicate public highways. The serpentine course south of Jackson indicates the lower portion of Elk creek. Farther south the heavy dotted line marked Elk creek ditch indicates the line of the old Elk creek ditch which is no part of this improvement except at the lower end. To the southeast corner of the map are two heavy parallel lines not in a straight course marked Omaha creek which show the location of Omaha creek. Exhibit 38 is a profile of the Elk creek ditch commencing in Elk creek, the straight line below the top line marked grade, is the grade of the ditch at the side of the bottom. The line under it marked subgrade, is the center of the bottom, the lowest part of the ditch. The cross section shows a right-of-way 200 feet in width with a ditch having a 30 foot bottom at the grade line and 20 feet clear bermes and the waste banks or levees extend out to the right-of-way on both sides coming up to within 20 feet of the top edge of the ditch. The shore parallel lines immediately south of Cut Off lake indicate the water level in Jackson lake in January, 1910. The elevation of water being 61 and a fraction feet. At the other end of the profile similar lines indicate the water level of the creek where the ditch crosses or taps them. Plats 38 and 36 are correct. Yes sir, these plans present a feasible and proper way of draining this territory. It will fulfill the purpose for which it is intended, will give the relief as set forth in the report and discharge the flood waters from Elk creek. Yes sir, I have a plat of the land north of Jackson made under my direction. Exhibit 50 is the plat referred to. The enclosed line around the word Cut Off lake indicated the margin of the lake. Extending from the upper left hand corner to the center part of the map and connected there with other inclosed lines shaded in white, marked chute and extending out into the
190 words Missouri river. The heavy line under those words indicates the bank of the Missouri. The elevation marked elevation on ice was taken January 22, 1911, and the same character of figures, inclined small figures, indicate the bottom level of the chute. The observations were made under my direction. I was not on the ground at the time they were taken, the map was made in my office in Omaha from observations taken. Mr. Nelson, my partner was the engineer present when they were taken. Exhibit 50 was made from data which he got. The other inclined figures over the surveys of the central part of the map are elevations on

the land. There is another chute across the center part of the map along which are parallel dotted lines indicating the traveled road. The Marks "W. L." March 31, 1911, indicate the water level taken on March 30, 1911, of the Missouri river, 16.06. The main ditch is shown at the upper left hand corner.

Witness excused temporarily.

HARRY NELSON, on behalf of defendants after qualifying as an expert engineer, testified:

Have been with Mr. Towl two years last April. I made the surveys from which exhibit 50 was made. The data and dates there set forth are correct. I heard Mr. Towl's testimony as to what these figures, lines and representations indicate.

Cross-examination:

Mr. Towl's brother Fred assisted me in making observations some of them in January and others in March. Yes sir, he is a civil engineer. We went right down through the center of the lake on the ice. We made the survey with the stadia. I have not one of those instruments with me, it is an instrument we use for surveying except it has two wires in there which give the distance.
191 Yes sir, an instrument of observation. We did not use any chain or flag in going down through the lake. We did not use it anywhere, we took elevations with a transit, no other means. I made some and he made the others. I made these lines (indicating). Mr. Towl made the high elevations, I was carrying the rod at the time. The rod we use for getting elevations. Mr. Towl made the elevations down in the chute, I carried the rod. We used a stadia and used stadia measurements. The transit and stadia instrument is all one. Yes sir, that gives the distance and the elevations. Yes sir, we left stakes or marks. We had stakes there in the ice. *Yes sir, we left stakes or marks. We had stakes there in the ice.* Yes sir, put some down myself. We drove some stakes in the ground for bench marks and used fence posts for bench marks. There is a stake right in just a little west of the chute *of the chute* on a fence there. The stake is not marked. There is one south of the road. I am not positive whether it was a post or a stake driven near the post, my recollection is that it was on the post, a blue keel mark on the post. It is west of the bridge. A fence post at the south side of the road. We left some marks down there by that. No sir, we did not drive any posts, we blazed some fence posts, one up west of the high ground shown here on the east side of the chute, on the west side of the chute is another fence post blazed. Yes sir on the north side of the road about in there, marked 3.06. There is another stuck up on the high bank, about 76. My assistant drove it, it is a drift stake that came down from the river. Driven right in the edge of the fi*l*ed there. A board stake that I stuck down there. We had another stake down near the water line, yes sir, over the bank. It was a small stake. Yes 18 or 20 inches long driven close to the ground. As I recollect there is another

place marked west of this house. Yes sir, there is a stake in the ground there. It is out by the field not by the road. Driven
192 at the corner of the land where the fence comes right down here. There was a little stake driven into the ground. No an ordinary man would not see it. We drove other stakes in taking our elevations. That is the kind of stakes we set. I would not know how many we put in, more than four, more than half a dozen. I do not know whether there were more than eight, we put them through the fields where we went along and took our measures. Yes sir, little bits of stakes or posts, they were all the monuments we left. We were about three or four days doing this work. No sir, did not use a chain. We did not have an old survey, we had a map but I did not use it. It was Holmvig's survey that an old man showed me. I looked at the general outline of the map that is all, did not use it as a part of this observation. Any man could use an instrument and take observations if he is able to calculate the work. Yes sir, he could tell the distance and determine the magnetic determination of the piece. That is about all there is to it. Yes sir, there is more in drainage engineering. My work with the road helped me to become familiar with instruments that is all, but you have got to be familiar with drainage in order to put bridges in railroad work. No it is not difficult and it is not drainage work. Building bridges is not drainage engineering but it is drainage.

Redirect examination:

Yes I can indicate my original bench marks and give the levels shown on exhibit 49.

Recross-examination:

In the lake elevations of the ice 60.03, bottom 56.03, then going down to 59.04 the variation is a difference of .9 of a foot in elevation. Taking the bottom of the lake 56.03 up here and 59.04 down here, shows a variation of 3.1 feet. The elevations were taken from two to five hundred feet apart.

193 Redirect examination:

Yes sir, the elevation 56.03 is the bottom of the lake and the elevation 60.03 is the ice on the lake at the same point at the same time.

Recross-examination:

But the point 59.04 is the bottom elevation also. Yes sir, the bottom at 56.03 is lower than it is at 59.04. Yes sir, the marks at the chute are bottom elevations, and those up toward the Missouri river are bottom elevations. In taking them we measured down through the ice with a stadia rod. At the bottom the soil was handy and soft. I could shove the rod down through the soft stuff. When you shove the rod down you can tell when you strike sand. When the rod touched mud its own weight would carry it a certain depth, not very far, it might go in two inches. Yes sir. Yes sir, we took that with

an ordinary surveyor's rod. Yes sir, when it began to get a little harder to shove down you might get a variation of .1 of an inch or ½ an inch. A person could get it closer than that if they were watching the rod when they struck the sand. The water was four feet deep. There was quite a hole in the ice, I don't remember whether I could see the bottom or not, I would not say. Yes you could tell when the rod struck the soft mud to within an inch or two inches. It is a wooden rod. You can tell very close when it strikes soft mud or silt. No you cannot tell absolutely. Yes sir, I have dropped it down and got about a foot of mud and it was five feet deep. I could see the indications of mud. The depth of that lake measuring through the ice could not tell exactly, it would vary an inch or two inches. Yes sir, the bottom of the lake and of the chutes vary. For instance taking the elevation along over the chute we do not take every time in the center of the chute. The elevations from here through are about 1,000 feet apart. Yes we made an estimate of the average fall of the lake toward the river but not on the bottom. It does not have a gradual fall, there is no regu-
194 lar grade to it. We simply took the average of the ice and went on down through there. Yes down through the lake. Yes sir, with a view of determining the fall through lake. It is a good fall from the top of the ice down here to the top of the ice on the Missouri river. That was made by taking observations through the ice, taking the elevations on the ice with the instruments, that is the only way. I think we took about from ten to twelve elevations. I did not record all the elevations we took. I recorded them in a book but did not put them down here. We found some places higher than others, in this outlet only at the end of the lake, that was sort of a gradual slope from the end of the lake down through the center of that chute, that will naturally leave the ground looking higher but, however, it is about the same elevation as the ground up here. Yes sir, at the opening of the lake in the southwest of 26 the ground was higher than we found it farther down. Yes sir, higher than the ice on the lake in several places, about .8 of a foot higher. Just at the end of the lake where there is a little fan-shaped layer of sand, that is about .8 of a foot high. The minute you strike there you have a gradual slope down to the chute, but that is .8 of a foot higher than the ice was at that time. At the foot of the lake the water stops, and at the foot of the lake this is two or three times as wide as the outlet. Yes sir, right where you cross the bridge it is narrower than at the outlet into the chute. No sir, in the chute it was not dry in January. We were on the ice. I think it was about low water. There was ice in under that bridge in that little narrow part. From this bridge to the foot of the lake is probably close to half a mile. I went up there right where the outlet starts, it was filled in but there was a chute led out to that, it was covered with sand. I did not find any grass; rushes and willows were fallen in there. The map represents the condition taken right at these
195 points, but not the entire condition, we have got other maps to go with this. This map shows the condition just as shown here. I admitted that there is land between these points higher than

the lake, that this point here is .9 of a foot lower than the top of the water and I said there was no water running down there at that time. Yes sir, south of the point marked 59.4 there is land that is higher than 59.4 in that chute and also north of this. The map does not show every detail, it does not show every little detail.

Redirect examination:

Exhibit 51 shows the grade line of the ditch emptying into Jackson lake. That is shown by the line marked grade line ditch. The dotted line below shows the four foot subgrade of the ditch. The elevations are at one foot intervals making four feet to an inch vertical in 2,000 feet, 10,000 feet to an inch horizontal. The line near the left hand on the high map, the elevations of the ice on Jackson lake. The wavy line above the ice level between figures 120 and 110 shows the elevations of the ground above the water in Jackson lake. Carrying it on to the right until you strike more parallel lines, that is the elevations of the ice in the chute and the heavy white line between the ice and the chute and the ice in Jackson lake represents the ground elevations from the outlet of Jackson lake into the chute. The four V shaped figures to the right hand of the plat represent cross sections of the chutes. The outlet of Jackson lake taken at this stage, stage 145 is right near the junction of the outlet to the chute, the others are taken down through the chute at different places. The white line on the ice immediately to the left of that show the level of the Missouri river water. The data from which exhibit 51 was prepared was gotten at the same time the data for exhibit 50 was taken. They set forth the correct conditions.

196 Cross-examination:

Yes sir, exhibit 51 is a kind of explanation of assistance of exhibit 50, the two must be taken together. Down to the water's edge where I took the elevations. From the top of the bank down to the ice would be about 50 feet. One falling over the bank would not strike the water, you would strike brush before you hit the water. I should think it is about 35 to 50 feet. I measured it with a stadium from the bank of the lake, from the point where the ditch empties into the lake. I did not go right to the edge of the ice because of the snow drifting in against it; the bank is fairly steep. I have not been out since January. Yes sir it was the same stadia I used in making all these measurements used no other instrument. That bank, from the top of the ice to the top of this bank is between 13 and 13 feet. I did not take the measure from the top of that bank down to the ice line. I know that distance only by observation. There is a rod used in connection with the stadia. It takes two persons, one to run the instrument and the other to run the rod. The instrument gives distances correctly.

Redirect examination:

We test these stadius by chain measures. I had tested this one perhaps a month before that. They don't require testing every time

we use them. I don't think I have tested it since that survey was made. At the time I tested it it was correct.

Redirect examination:

The instrument was what is known as a fixed stadia, if found correct once it stays correct unless injured. In order to change it you have to send it to the factory.

Roy N. Towl, recalled fo rthe defendants, testified:

197 I have been over the outlet from Jackson lake to the junction of the first chute with the second. I have figured the capacity of the main ditch and estimated the acreage of Jackson lake, and have estimated the out flow from Jackson lake. From observations I would say that the maximum floods occurring from this watershed would discharge from 2500 to 3000 cubic feet per second and this water being discharged into Jackson lake when it would reach an elevation of 62, it would require at least 12 hours to reach that elevation, assuming that the Missouri river was not entering the lake at the west end. The backwater in the ditch at the outlet would affect the discharge. The influence of the backwater would extend back at least a mile when the river was down, if the river were up and flowing through Jackson lake, the influence of the backwater would depend upon the stage of the river. But under ordinary high stage of the river the influence of the backwater would extend clear up to the railroad in Jackson. That would have to be overcome in the discharge of the ditch by increasing the hydraulic grade line for the head within the ditch to discharge the entire volume of water against the backwater. The ditch empties into the lake on the outside of the natural curve of the lake where there would be a greater velocity than on the opposite side. It is inclined down stream so that the water would partake of the velocity of the water flowing through the lake in flood time, and would naturally increase the flood stage of the Missouri river when it was running through Jackson lake. So that the only condition that I would consider in the outflow of this ditch would be a low water stage of the Missouri river in entering Jackson lake and discharging, when the waters in Jackson lake get .8 of a foot above its low water stage and discharging continuously after that and reaching a maximum

198 width of 62. Now an elevation of 62 extends around into the chutes leading northwest from the junction below the outlet of this lake. The stream discharging in that length of time would have passed its crest, that is the crest of the stream on Elk creek would not stay up to exceed 12 hours and the discharge capacity would be reduced as the crest of the flood subsided. Yes sir, that would be working against the ditch discharge. It would not be possible if the ditch were running to its capacity for the land above two feet higher to be flooded by such conditions. There would be no effect on the land on the south part of the lake when the Missouri river is at an exceptionally high stage because the water would be confined within the ditch and within the levees and discharged by the accumulated head out to this broad body of water

connected with the river and it would spread out so it would not abruptly raise the level of the river or Jackson lake. There will never be any erosion outside of the right-of-way of the ditch at the outlet of Elk creek ditch. With a grade of six feet to the mile there will be no erosion on this part of the ditch beyond what is natural and that will be within the waste banks and not to the detriment of the ditch or any of the adjoining land owners. It is — simple problem to protect against erosion. I have examined the samples which are in bottles numbered 1 to 8. They show no visible evidence of sand. Samples 7 and 8 show a percentage of sand mixed with soil. None of the samples show quick sand. Seven is less than half a mile from the outlet to the lake. Eight is about 3 or 4 hundred feet from the bank of the lake. Yes sir, fixing distances by plat exhibit 48. At the time of the survey there were stakes at frequent intervals and the line was run out as a transit line. There was a stake at the terminus of the ditch.

199 Cross-examination:

I did not place the stake the first time, I saw the state when I went over the line. I did not personally place any stake. I saw several stakes across the line. There was not a continuous line of stakes but about 100 feet intervals. No, no stakes at the intersection of Honey creek. On the bank of the lake was an ordinary stake a foot or foot and a half above the ground, a pine board. The next was at the first fence. I don't remember distinctly what that was, it was similar to the one mentioned I think, a piece of pine board. The next is where we crossed the fence between sections 25 and 36. I think they were all pine stakes. The next one was at the side of the road east of Jackson. The next I could not say definitely. I would not say absolutely that I saw five stakes. I think it was in March, 1910, that I saw these stakes. That is the survey we made. I went over that in March 1910, that is my best recollection. Those are the only stakes I saw on that portion of the line. I did not look as far as the railroad. I was not concerned with that. No did not see a blaze of any kind anywhere. I did not see a series of poles or posts with rods. Yes the railroad right-of-way is staked out. There was no outside stakes at all in this. At the distance of a mile and a half I saw as many as four stakes. I could not say who was with me. I think likely that is all there was on that part of the line. There were some bench marks and reference points. By bench mark I mean a permanent point used for elevations. We establish the bench marks along the line so they are permanently located and can't be re-established. I could not say where the bench marks I spoke of are. Take the profile it will give you the elevations.

WILLIAM W. REINIGER on behalf of defendants testified:

200 Have lived 6 miles southwest of Hubbard for 3 years, prior to that north of Jackson. Was there in the fall of 1880 and constantly ever since. I have known Jackson lake since the spring of 1881. The river then struck into Jackson lake at a point a little bit north and east of Henry O'Neill. And it was from years before

the O'Neill Cut Off that I knew of it there. I have known about it in the last three years. I think I know the conditions shown on exhibit 50. No, I don't know as to whether or not the water in Jackson lake has varied in the stages at the time of high water, it would run into the lake at times and then empty out again. Yes sir, when the river is high the lake would raise. And when the river would go down the lake would follow it. I think there have been years perhaps the water would get high enough to go into Jackson lake, I know a good many years it never got high enough but would back in from the east end. We made the first break on that road, my brother-in-law and myself. Yes sir, we always crossed the outlet that comes from the lake into the chute north of it, we would go over it quite frequently. I think I never crossed when the water did not flow out of the lake into the chute, winter or summer. This land (indicating) is what we have always termed sandbar, it is all made land with the exception of a little piece. Yes sir, where the buildings are, there is a little piece, perhaps a quarter of an acre, supposed to be original land. It was high land when I first knew it. I have ran on both sides of it with rafts and steam boats. Well a big percent of this land except the points referred to is submerged in the June rise.

Cross-examination:

I quit running on this river in the late '80's. There has not been a great deal of navigation since 1880. Most of my running
201 on the river was with rafts, from Reiniger's neck at the north end of Jackson lake to Sioux City. Jackson lake never has been a part of the navigated stream, further than about this point here where we ran into this chute. I have fired steam boats in there in the early '80's. I don't know whether the government meandered this lake. I could not say where the meander line is. The river was way north of that lake in 1896 or '97. I left there three years ago last March. The land between the chute and the north of the lake was all under fence excepting here and there a little bit when I was down there. It was sowed to tame grass. Yes some of the bayous along the river occasionally overflow. I saw it nearly every year I lived there. I have not been up to the head of Jackson lake in three years. I was down last summer and took a view of this country, the river had been high and was quite high at that time. Yes sir, when I was there the current flowed along the bank striking below Jackson lake perhaps a half a mile. The other lake north of Jackson lake has formed since I was there. I don't know whether the conditions at this time are the same as when I lived there. Jackson lake is usually clear if it has had time to drain out the sediment of the river that backs up in there. Yes sir, it is water in it the year around. There are springs around Jackson lake. I know where Henry O'Neill's land is. I think I know that the lake runs across it. Yes sir, north of his land and north of the lake are improved farms. I think most of it is improved about as well as it is west of there, cross-fenced and crop-ed.

Redirect examination:

If the water in the lake was raised two feet from low water most of the land that would be covered is in brush, willows and bushes. Yes, there are cottonwoods and willow trees there. I think there are some higher than this ceiling. If you go back eight or ten
202 rods from the lake you would run into grass and trees. Yes sir, at varying distances there is timber that has not been cut away.

Roy N. Towl on being recalled for further redirect examination, testified.

I have been around the lake on the north so as to know its character. The two foot raise from the condition that now exists would cover only low waste land.

Recross-examination:

That would extend back to an elevation of 62 on any part of the map, it will go back a short distance from the lake all around the margin and up into the chutes, clear through the chutes and cross chutes. It would average, perhaps ten rods. Back of that the land is susceptible of being cultivated, vegetation would reach clear to the lake. I have just been up into the hills above the confluence of Honey creek. I did not go up Elk Creek itself. I have been up in the hills though. Did not go as far as Ponca nor as far as Waterbury. I only know the streams tributary to Elk creek from the maps. Yes there can be more than a dozen tributaries. The water-shed of Elk creek hits up pretty well to the south in some of its branches then it has a fan-shape that goes to the west and to the north. I have the data showing the mileage in my office. I would say perhaps the estimate- distance from any of its tributaries to its outlet on a direct line would be 12 or 15 miles. I have the data on the drainage area of Elk creek before it reaches Jackson, before it reaches the confluence with Honey creek. I think it is approximately 120 square miles. I could not give the capacity of the channel of Elk creek above the confluence of Honey creek. Supposing that above the confluence of these two creeks the valley from hill to hill was 1,800 yards and water should go down
203 there under that flow extending from the base of one hill across the valley to the base of the other, the banks at each side 1,800 feet instead of 1,800 yards at a fall of 26 feet per mile, I am going to take care of that water in the ditch. Under those conditions the water out of the banks would have very little effective velocity and the channel itself would be greatly obstructed on account of this crooked curve and it would be a very difficult matter to tell what the discharge would be without making an actual current meter to test its velocity. The ditch has a larger receiving capacity at the upper end and it has the largest fall at the point where it receives flood waters at the junction of Honey and Elk creek-, and what water is not received at that point in case of a cloud burst would be received at the next point below where the creek would touch the ditch, just outside of Jackson where Fisher creek enters

from the north, so that this water will be all backed up by the time it comes to Fisher creek and gets into the ditch and will be held inside of the waste banks in the ditch. That is my opinion. I cannot answer your suppositi-ous question by yes or no. The ditch would prevent the greater portion of the water from flooding Honey creek and Honey creek valley and escaping that way. What would escape would be picked up further down the ditch. There will be an opening at the entrance for the Fisher creek water. The waters you think are made to escape would go down the ditch until it got to the entrance of Fisher creek. We propose to tap Elk creek on the north side of the Burlington road and north of the confluence of the two streams. There won't be any low space between the Burlington road and the proposed ditch when the ditch is constructed, we are going to put our west bank on the Burlington grade. The dirt we will put up over that hydraulic construction will be the most solid levee that can be constructed. Certainly the dirt we dig out of the ditch. No sir, we are not going to have any other
204 ditch protection through there. There won't be any low swale of 100 feet or anything like that. We will deposit waste materials right out to our right-of-way and the Burlington has constructed an embankment on their right-of-way leaving a space fifty feet or less between our embankment and theirs and we expect they will be tied at that point. We infringe upon that right-of-way sometimes. We have permission of the railroad company. I have talked with their drainage engineer and I think we will. The detail of our plan may contemplate it. The detail won't be perfected until the construction of the ditch. If there is any space between the output of dirt thrown out of our ditch on the south side of the Burlington road I can tell you what will happen to the water. I am not guessing at all, I will say that water will be carried into the ditch, that is the purpose of the ditch. The railroad company will have the right to take part in this ditch and they are going to do it. I do not say that water cannot go down Elk creek valley so that it will flood the whole country there at the confluence of the two creeks, if it does, it will spread over the country undoubtedly. If it goes from the railroad track it will come down there (indicating). If it comes down between the railroad track on the north it will be prevented, it will go under that bridge. If you leave it open it will go through the ditch at this opening, that is a safe proposition. We will riprap it if necessary. We will not do any masonry or concrete work at present, we have no plans either for riprapping or concrete at this time. Basket work won't be necessary. Riprapping or concrete work or basket work won't beat the dirt in that ditch. With an overflow of the water running on the south side it will follow the course of the creek, it won't go on the south side. It will follow the channel of the creek. Dot No. 1 (referring to plat) is almost directly at the confluence of Elk and Honey creek-, slightly north and a trifle east. It is in the right-of-way of the ditch. The right-of
205 way of the ditch joins the right-of-way of the railroad, perhaps 132 feet north of the center line of the track, the flood waters will go down north of the ditch. That won't get to that point, sounding No. 2 (plat exhibit 48), that will be on the north side of

the ditch. That is, the water that does not get into the ditch under your extreme case and flood the ditch, won't back out at its upper end, it will go down the north side. Yes sir, any waters escaping on the south side of the railroad will go down the south side into the valley. Assuming it escapes from the west bank and over the track, it will go south of the opening that is maintained; if the opening is closed it will go on down. This ditch will carry about 5,000 cubic feet per second, it would not carry 10,000 cubic feet or 6,000, it would go out of its banks and be carried between the waste banks. This 5,000 cubic feet makes the ditch level full ordinarily. Just like filling up a tin cup to the brim, that is the idea. There would be no perceptible wastage or seapage. For a short distance a fall of 26 feet to the mile is not so bad. No there are no large streams in Nebraska, Elk creek has that fall for a short stretch. If it came down from the point of the ditch to the point marked crossing of the M. & O. road, it would have a fall of 26 feet for about 4,500 feet. We carried a 26 foot grade for a distance of 1,200 feet. The total distance on the proposed ditch that we proposed to carry 26 — fall is three quarters of a mile, that puts us into Jackson, 200 feet west of the railroad crossing. About the center of the business portion of Jackson. From there on we propose to carry it at 6 feet to the mile. On a 20 and 25 foot base and the top hardly 50 feet practically that at 1 to 1 slope and 30 foot bottom. Yes sir, we widen it out 5 feet and deepen it. The ditch rises gradually from the road to the public highway and slopes gradually from there to the bank of the lake. From there it will be about 60 feet across the top. The
206 berms will be 20 feet on each side. Yes sir, Jackson lake will back up in that ditch at the low water stage about a half mile, and about three feet deep at the outlet and nothing half a mile or such a matter up. If Jackson lake rises a foot it would extend back close to a mile, that would put it within a mile of Jackson. A two foot raise in the lake would put it back across the public road running into Jackson from the east and the effect would be felt as far as the road. If there was a raise in the river it would throw this backwater back to the village of Jackson being two feet at the mouth of the outlet and at that time there was a two or two and a half precipitation all along the watershed of Elk creek and its territory, that would put more than 5,000 gallons of water in that ditch per second, the water that runs in from Elk creek coming down there meeting the back water would pile up, that is, it would increase the head for the surface slope of the water in the ditch and in the vicinity of Jackson where that would occur. The ditch has a greater depth than it has at the outlet. It would discharge under a head and overcome the back water from the lake. The road east of Jackson the depth is 22 feet. The center level carried back to the road or the depth at the road is 17 feet. The topography along that ditch is slightly irregular, the depth of the ditch is not uniform, we have to start uniform on the bottom. The top is irregular. The three quarters of a mile where the fall is 26 feet extends down to within 100 feet of the road, that stretch is 16 feet deep. We will maintain a depth there of 16 feet. The little depression we cross will be taken care of with our waste banks so that we will

have the 16 feet. From that point on it increases to 22 feet at the mouth and falls to 16 feet at the outlet to the lake. I have just explained those low places on both sides will be filled with the waste banks so it will virtually act as a maximum depth
207 rather than a minimum. The ditch will be 16 feet deep where it empties into the lake, that will be 3 feet below the normal of the water in the lake. Yes sir, at the low water of the lake, or 60 it admits 3 feet of water from the lake. No sir if 5,000 cubic feet or more comes down this Elk creek valley and meets this backwater in this ditch, it isn't going to overflow, it will be discharged. The water will accumulate until it raises to such a height, it will discharge under head. It will push out the dead water. It raises high enough to create a velocity in the entire cross section of the ditch. Yes sir, comes down and pushes it out in the lake. It does not have any obstruction so long as it is confined or back of the point of entrance. If it would it would have to go out there and it would have to go out of every other stream that empties into the Missouri river. The banks down there in the vicinity of the road are higher and will increase the head of the water. No the bank is not lower along from soundings 5, 6, 7, and 8 than they are above that. My own profile does not show it. At No. 5 the bank is 22 feet high and down toward the lake we have banks 16 feet high. With 5,000 cubic feet of water meeting the two foot of back water would not fill the ditch. The water would be forced out by increasing the head. If the Missouri river fills up as I said it would run over into Jackson lake, the water would be discharged from the ditch on the same principal. Five feet of water in the ditch backing up from the lake would fill the streets at Jackson. That would be 7 feet above the bottom of the ditch but we would still have sufficient capacity to discharge 5,000 cubic feet per second without flooding any of the land. Yes sir, still keep the water within the waste banks of the ditch. I did not say there would be no erosion at any point along the ditch, it will happen for the entire length to a certain extent. If a snag or an old tree came
208 down the ditch it would cause erosion, it ought to be removed. Yes sir, water would hit the bank and cut. When subject to backwater sand will not erode to any appreciable extent. There is no erosion in still water. When the wind blows the water up against the banks it erodes to a certain extent. Yes sir, in proportion to the force and quantity of the water and the velocity and character of the soil where it strikes. Bottle No. 1 is Missouri river clay, I don't know its composition. Sand is a granular substance, insoluble. No sir, any collection of particles of fine stone is not sand. Loess is one of the formations common in eastern Nebraska. It is brown or buff and fine granular and homogeneous in composition. It has a large per cent of silica. I would say no silt ordinarily. The silt is deposited above the loess. Usually silt is alluvial particles of soil washed down from the hills. The top soil that is brought down. I classify bottle No. 1 as loess formation because of its absence from sand. No. 2 is soil with some loess in it, 3 is apparently the same, it is not sand; 5 is somewhat different, some gumbo in it. No perceptible sand. Quick sand is a certain class of sand, it may be

surcharged with water or dry. I do not know what geologists would consider, but the quick sand I have had to deal with is of that nature. It is not pebbly. I never made any study of geology, never studied Hugh Miller. I have gone over the geological reports of the government generally. I did not have time to read them all. I have one of Dana's works and I do not have Le Conte. My statement is very largely based upon my observation, my work from time to time. I have seen the effect of ditches in this soil and I think perhaps I would have a better conception of the character of the soil than most generally educated men that did not specially apply it to works that require soils as a foundation. I am not prepared without data to tell you what causes the eating under and falling in of banks.

209 The erosion in the ditch as a usual thing proceeds from the outlet up stream and on account of its outflow; erosion is lateral to a certain extent and under certain condition- will cause a falling in of the banks. The soil in these bottles is a soil but it does not partake of the nature of heavy black soil. I suppose there would be some humous in these samples. I did not find out when the survey was made of which I saw the stakes in March. It was in January preceding. I was there before it was made and afterwards, I saw the stakes. I was not there when they were driven in. I do not know whether they were sharpened or not. I did not attach sufficient importance to it to learn. All I pretend to do is to give my opinion as to what will or will not happen under certain conditions in my testimony. I could not tell what would happen only from what has happened and what I have seen. It is something more than a theory, it is a theory based on fact in the same valley and under the extent of my experience. My observations extend between here and Kansas City principally, along the Missouri river for about 700 miles. I think there is a way of determining the hydraulic grade line on a formula endorsed by Humphrey & Abbott in their experiments on the Mississippi river. I don't know that I could demonstrate that theory this afternoon. Yes the hydraulic grade line would change from time to time depending upon the amount of water in the ditch and the resistance it made. If the waters in Jackson lake were to raise to the top of the ditch or to the bank of Jackson lake, it would carry the water about a quarter of a mile west of the M. & O. crossing in Jackson. Then, of course, above that the water would have to have increased head to discharge. Supposing the ditch to be level full at the mouth of Jackson lake and a flood to occur up the valley of Elk creek, that would be a problem that would take considerable calculation. You cannot solve a problem like that when you have a stage of

210 the Missouri at 22 or 23 feet that would be unprecedented. It would require all the water of the outlet to be discharged within the waste banks. I do not believe the result would be as serious as might be expected. I cannot be positive. Theory and practice do not always go hand in hand, we are endeavoring to bring them closer and closer together. If the back water had an elevation of 72 it would cover all of the land from the high land to the north. In my opinion without going into calculations, it would tax the ditch to its utmost. Yes sir, we are going to have practically a

levee system. Yes, the dirt we are throwing out is all right for a levee, sand levees are commonly used. They are now building one on the Missouri at Kansas City. There would not be danger of their breaking if they did not exceed 3 or 4 feet. If they got 8 or 10 feet, which is impossible, they would break out. Yes sir, on the Mississippi levees are constantly breaking, but that is a very different proposition. Yes sir, these levees will soak but it will take them quite a while to get soft, they will become soft in time but not during a storm. I presume those levees as originally constructed will be 12 or 15 feet high and will settle to perhaps 6 or 8 feet. The levees will have to allow the road to pass through. The road grade is not very high. The level at the road will not be required as much as it will further down. When we get beyond the railroad we will need the levee system. The surface line from the railroad to the bank of Cut Off lake will have a fall of 10 feet in 8,000 with the water running at the height of the railroad. The levees will not be required. That fall will discharge pretty close to 5,000 cubic feet of water per second. Yes sir, going to have these levees up at the mouth of Elk creek south of the ditch as a matter of excess drainage capacity to help the ditch. The ditch is larger at the entrance, it is not decreased. There will be an equilization where the
211 change of grade comes and I believe it will be possible to discharge against any stage of the Missouri river in flood that goes down Elk creek. I have made estimates of those floods. I have some data on it. I think my ditch will carry it. That is not a difficult problem. To take up a foot of water a quarter of a mile across and 8 feet deep at the deepest place with a velocity of not more than 6 feet a mile. I cannot answer how many cubic feet will come down there per second without knowing the nature of the obstruction. I would say that water a mile wide and 6 feet deep has been carried by a 30 foot ditch with a 30 foot top with a similar slope to that in the Papillion valley. South of Jackson there will be provision made for the entrance of the water. The creek banks are higher where they go in there. The village of Jackson did not require of me that they leave some openings in the dyke south of town. I do not know it is a fact that we intend doing it. The openings could be in the nature of flood gates and would not prevent the water going down the ditch. No it is not a fact that we are afraid of this ditch and dyke on the village of Jackson. I don't know why we don't fill it all up without openings in the dykes, that is something I have not heard of. I haven't the data as to the velocity of the water from the beginning of the ditch to the point where the fall is 26 feet per mile. On a 26 foot fall the mean velocity would be about 16 feet. It would cause some erosion. It will stop eroding when it has reached an equilibrium, when the forces which make up the resistence equal the force of the water. There is a limit to the erosion. I can give you an example, Elk creek has gone just about so far with its erosion, it has run its limit of erosion. I do not know the velocity of Elk creek. You would not have a 16 foot velocity on account of increased cross section. You might have the cross section full in times of remarkable flood

and get a ten foot velocity. A ten foot velocity would not
212 erode rapidly. I would say that the erosion would be replaced by sedimentation.

JOSEPH BRENNAN on behalf of defendants testified:

Have lived at Jackson 52 years; am 52 years old. Know Jackson lake. North of Jackson lake I know the territory since it was made. The river formerly ran through Jackson lake. I see the lake every year maybe a hundred times. Our land lies right up to it. The stages of water are changeable. They change twice a year as a rule, in spring and in June or the first of July. Sometimes the water goes through from the north and sometimes from the east. Sometimes flows in and sometimes backs up through the chute. Sometimes I have seen it run clear over the banks. Ordinarily it will get up four feet. I have seen it within five feet of the top of the bank. Yes, that is where this ditch runs along. My land is north of Henry O. Neill's in section 25. The lake always raised when the river raised, then it would go down; when the river fell the lake fell. I never crossed the outlet at the east end but once fifteen years ago. I saw the lake in 1910. There was quite a current running through there from the north and west down through to the east and out. I could not say as to 1905. I know the lake was high. I have been to the northwest of Jackson up Elk creek valley lots of times. I have seen all the floods come down. The Burlington crosses Honey creek right here (indicating). The water comes down through Jackson. It has a pretty strong current; up here where it is extending from road to road it would not be so strong. There is always quite a channel of water down through this Horace Duggan land. There is a low place in the creek here that gets out and flows through there. Elk creek does not erode or change its channel. The soil in that valley along section 35 and through Jackson to the west is black loam. In 1910 the stream through
213 Jackson lake was a big river, it looked to be very rapid, taking everything in there. Along the lake on the north and east it is all low. They have some broke up and they have alfalfa, timothy and are farming it. I saw it day before yesterday. If the lake should raise two feet I don't think that the land covered by such a raise would be any good, it is all brush and willows. Of course if you go east further the land raises. Yes in 1910 the land north of Jackson lake was submerged for a ways, the water was running down through what I call the Williams chute. Yes, any decent raise sends it through that chute. The stream that flowed into the head of Jackson lake in the spring of 1910, was a big river, taking logs and drift and other things down and just rolling over and over. It was running fast for the reason that the ground was much higher where it came in than it was at the lake, and made a very strong and rapid current, and I should judge was five feet deep.

Cross-examination:

Under normal conditions there is a quarter of a mile between the river and the lake. In high water it runs into the lake. At ordi-

nary stages it does not touch it. Am president of the town council of Jackson. The drainage district asked for a right-of-way through the streets. I was one who objected to giving the right-of-way without they left an opening for it on the south side of the ditch. We were to locate the place. Down near the depot at the south end of Jackson. We did not know but a flood might come and we did not want the town flooded, they would not agree. Mr. Sullivan had the original ordinance. He wanted that passed and we would not pass it and he carried this paper away. We did take action on it, it still stands so far as I know. That is to be an opening in the south embankment and they were to put in flood gates. Jackson is
214 right where the natural drainage is from the hills down to it. Part of the drainage district of the town runs into the Omaha railroad ditches. They carried it on down to where the ditch crosses and agreed to put in flood gates for them. I thing the opening was to be 200 feet on both sides of the ditch.

Redirect examination:

The ordinance was rejected. The motion was made. The understanding was that down near the Burlington depot and about where the street comes to the Burlington, this opening was to be made and a bridge put in. Yes sir, under these conditions they were given permission to construct the ditch along the line that was marked out.

Recross-examination:

Yes sir, south was all improved farms around south of the ditch at that point and it is practically level.

Redirect examination:

Yes sir, immdeiately south of this opening is territory that is in the drainage district. The resolution was made up by the board themselves. The one that was presented was rejected. One man made the motion and no one would second it. Tom Sullivan took it away. Sullivan's ordinance was rejected, the one he wanted with no opening. He could not get it without any opening, we would not pass it unless he would insert in it that there would be an opening. We passed one that there should be two openings 200 feet on the south side and I could not say whether the opening was to be 200 feet on the north side. I think Mr. Towl accepted that condition. He was present at that time, he made no protest against it.

TOM SULLIVAN on behalf of defendants testified:

215 Lived in Jackson 41 years; familiar with Jackson or Cut Off lake and territory to the north and west and northeast of it, also the country from Jackson to the west of Jackson and northwest and the Elk creek valley. Yes sir, have been familiar with the flooding in the Elk creek valley. Am interested in the formation of drainage district No. 2. One of the petitioners for the organization. Yes sir, referring to exhibit 50, the territory as spaced

between the two lines which include the words Cut Off lake, is intended to represent Jackson or Cut Off lake. The two parallel lines running to the southwest or to the lower left hand corner, are the lines of the proposed ditch running through Jackson lake, or to the lake, the two parallel dotted lines represent highways to the north and west of Jackson running through what is known as the highway to Sioux City. The two parallel lines in which the word chute is, is the chute carrying water from the Missouri river back to the Missouri river. I am acquainted with the conditions

Witness excused to permit further examination of Towl.

ROY N. TOWL recalled, on behalf of defendants testified:

About nine miles on the Missouri river at the point immediately north of the west end of Jackson lake to the outlet or where the chute enters the river. Don't know how far it is from that point to Sioux City. The difference in elevation from the Missouri river at the west point to which witness' attention was called, north to the west end of Jackson lake, the chute would be about five feet.

Cross-examination:

216 I just took this from the map. Yes sir, took elevations to show the difference in the height up there at the head of the lake and at the chute. Yes sir, it is shown on the map. Yes sir, testifying to what is already shown on the map.

TOM SULLIVAN recalled, on behalf of defendants testified:

Known Jackson lake over 40 years. It was first the channel of the Missouri river. Ceased to be the channel about 1882. It was but a cut off and after the cut off it ceased to be the channel and became a lake like it is at the present, dead water. Yes, I am familiar with changes in the stage of the water from time to time during the years in Jackson lake. It always raises when the water raises in the Missouri river and always lowers when the water goes down. Yes sir, water flows from the Missouri river directly into the lake at times. Well it flowed there this year, March 30, I saw it. A stream about 6 rods wide and a foot deep, that was on the north end of the lake here (indicating), right along the bank of the river. Yes sir, this road runs across there (indicating a point between the head of the lake and the river). It flowed over there about two feet I should judge. Yes sir, saw it myself, it was on Thursday evening the 30th of March, 1911. It was about 6 rods wide right at the river, down on the wagon road there it might have been 30 rods wide. Just about a foot deep where it flowed out of the river. It must have been deeper toward the lake. Yes flowed into the lake in 1910. Well it seemed to be all water. I was not right on the ground. I was up on the hill directly north about three *uaq*rters of a mile, hill maybe 150 feet high. It seemed to be all submerged but some high ground right near this point where this land was all covered with water. These changes in the rise and fall of the water in the lake occur to greater or less extent every year. Yes sir, at the same time
217 that the river is up the rise comes. A 10 or 12 foot stage of water in the river would produce a rise of about 12 inches in

the lake. Well it would be a quarter of a mile from the lake to the river at a nine foot stage of water in the river. I have been acquainted with the physical conditions to the west and north of Jackson lake along the Elk creek valley since I resided here. I have been interested with the floods and flooded conditions, yes sir, in land right close to that. Yes sir, am acquainted with the channel of Elk creek as it is now and was for years to the west of Jackson. The channel west of the boundary line of the drainage district has a less fall than it has down in the drainage district. It f-ows more rapidly when it gets down into the drainage district over there until where it crosses the Burlington railroad. It has never changed by erosion or otherwise. The condition is that the stretch and mud runs down off the hills and are deposited on the side of the creek bank, that don't wash away because the vegetation and grass stops it. In sharp curves it washes the vegetation out there. No material change in the channel in these sharp curves, it has been there forty years in the same place. The Elk creek comes down the valley, from the sides it has built up until the banks of the creek are higher than the land adjoining on either side, and whenever water gets higher than the bank of the creek it flows out and settles around and becomes practically dead water. Of course it always has a tendency to go down the creek but by reason of the amount of vegetation growing it slows it up there, but the channel of course carries it along, the other water flows in and out again. These conditions exist in the highest floods. About 12 hours the water would remain high, it would be about the greatest length of time. The railroad grade has been washed out two or three times. When the Burlington railroad grade is not washed out then the water parallels with the
218 railroad. If the Burlington railroad does not wash out the water until it flows over the top of the track, must go through the bridge, through that opening, and the deepest place in the opening from the top of the bank to the bottom of the creek is about 12 feet, not over 12 feet wide and that deep. Except when the road is washed out the waters of Elk creek go through that opening to the west of that. Yes sir, that has been so since the Pacific shortline was built in 1890. The bridge to the west of the main bridge was put in about four years ago. Yes sir, since 1892 three floods have taken out that track, otherwise all other floods have been handled through the openings that have been mentioned. When the water comes at times of floods it goes down on the north side of the Omaha track through the village of Jackson. Examining exhibit 36 he says the line which runs from a point in section 10 at which there is a junction with the Northwestern through Jackson, then on a northeasterly direction is the C. St. P. M. & O. line, the water goes north of that track then into Jackson, that is the way it gets there. I don't know much about the chutes and the land north of Jackson lake as to whether they carry water. Yes sir, know something by being over there, not recently.

Cross-examination:

Yes sir, in March of this year the water ran into the lake from

the river. I was personally out of the head at the lake. John Daley was there. *To* sir, did not see *Mr.* Mr. Wooley there at that time. Was there at 4 o'clock in the afternoon that day. The water running into Jackson lake at that time was about 6 rods wide and 12 inches deep. I was not there on the 31st. *To* sir, don't know when the water was the highest. I went to measure the water. Did not measure it clear across, estimated it. Not the same depth all the way across, estimates 6 rods wide. It was Missouri river
219 water running in there, I could not be mistaken. I knew it was running in there and took a measurement and was particular as to the time and date. Yes sir, Jackson lake rises and falls every year with the river, whenever the river rises or falls it effects the lake. I think it does effect the lake whether it flows in or not it backs in. It would percolate through the soil if it did not back in. It flowed in this year. No sir, I do not think that the level of Jackson lake and the level of the river are always the same, there might be some difference. You might take sometime when the water is high in the river and not sufficiently high to run in over the north end and back in from the east end and percolate through the soil, during that time it will be a difference in the level of the lake. The length of time it would take to percolate would depend on the elevation of the river I should think. I don't think the river north there ever changes its course it runs over sand. If you get higher water I believe the subsoil is harder to penetrate than the top soil. Don't know what the height of the river is now. I should judge quite a considerable raise before it begins to percolate. Yes sir, pretty well acquainted around Jackson. Yes sir the people put poles and brush and other material at the bridge in Jackson to prevent the Elk creek from cutting and washing. Yes sir, it was caused by a jam in the wagon bridge.

Redirect examination:

It was in the day time that I examined Jackson lake, following the bank of the lake from there a mile continuously up the bank of the river. The water report of the station of the river is taken at 7 o'clock in the morning at Sioux City on Thursday morning. The river started to raise and flow into this lake about 9 o'clock
220 Thursday morning and went down during the night. It raised a little sometime in the night and went down again by 7 o'clock Friday morning. Referring to exhibit 36 he said the water flows east and southeast. The highest water in the Elk creek was September, 1906. Went over both roads right in the center of the town. Yes sir, was present during these floods in Jackson. The water flowed in a southeasterly direction from Jackson over the land included within drainage district No. 2.

Q. Now have you for years past investigated, and by the condition there possible, the probable course of a drain running through the district and on to the river?

The plaintiffs object because there is no foundation laid, that this witness has not shown himself qualified to speak upon the

subject, incompetent, immaterial and irrelevant. Objection overruled. Plaintiffs except.

A. I have traced it a number of times.

Recross-examination:

Yes sir, about 4 o'clock in the afternoon when I made my observations of the water at the river and Jackson lake. The water begun to run into the lake about 9 o'clock in the morning.

JAMES KENNELLY on behalf of the defendants testified:

Am 32 years old and have lived in Jackson all my life; know Jackson or Cut Off lake. Saw it several times in the spring. Don't know that I saw the water running into Jackson lake from the river last spring. Well now I have seen the river go in there but don't know whether it was in 1910 or not. The last spring
221 a year ago. It was a lot of drift wood floating in there, that is, coming out of the river into the lake. That was at the northwest end of the lake. The stream was about half a mile or three quarters wide when I saw it.

Cross-examination:

The water would run into the north end of the lake. Referring to exhibit 50 don't you know that between the head of the lake and the river is very high ground going off this way, but it is not here. Don't remember where these dotted lines are. There is a high bank that runs down to the east. Yes, there is a dry road right in here, I don't know about a sharp bank west of that. This water I told you at the time I seen it was half a mile or three-quarters of a mile out to the east before you could see land again. I don't think it would have to run on the land as high as the west bank to get that distance. No sir, don't know that directly north of the lake in the Missouri river there is a bank 15 feet.

Redirect examination:

Yes sir, however high the land may have been up it was covered with water at that time. Yes sir, lots of it flowing out of the river. Lived in there two or three years, during that time was acquainted with the lake when it would rise or fall at different times of the year. Very frequently the lake would raise when the water would be high in the river. There was a chute off east of where I lived and the water used to go into the lake and raise it to the river. The river would go down and the lake would go down also. Well, it was down that chute east of where I lived that the water ran out. It was northeast of me where the water went into the river. Noticed this lots of times.

LOUIS MCKENSEY on behalf of defendants, testified:

222 Am 40 years old and live on Walker's island. Dakota county, Nebraska for about 30 years. Am acquainted with Jackson lake and the land called high land north of Jackson lake

to some extent. I hunted there a good deal every fall and spring. Yes sir, am acquainted with Jackson chute or outlet from Jackson lake. Have been familiar with it ever since the river ran around through there I couldn't tell exactly when the river ran around through there. Well it is according to how much it falls or raises whether the water in Jackson lake is affected by the rise and fall of the river. In extreme high water it overflows and runs into Jackson lake. It did last year and this year but this year very slightly. It has been going out of the lake after the rise until this year and last year I think the waters run to the north instead of the east because this end was filled up so the water did not run out. Yes, prior to filling up it ran out through the chute at the east end of the lake. Practically every year ran in and out there. There has not been a year I guess but what I have been there. I was there in the spring of 1910, it was pretty nearly a flood all over the bar, it looked like a river running through the lake. Yes, I have been up there this year, was there when the river was the highest. It ran in just a little at the north end of the lake along about the first of April sometime. It didn't raise the lake to amount to anything.

Cross-examination:

Walker's Island is west of Jackson lake. This is the sand bar over here, but it is farmland. Walker's Island would be down off here east of this. It comes and this makes this little turn. The chute running from the outlet in the Missouri river to the northeast is close to Walker's Island. Walker's Island I should judge is four or five miles over here. I don't know anything about the government of the United States having surveyed the part
223 of the Missouri river. Couldn't say about the meander line of the Missouri river being north of Jackson lake. Yes, farms run across this lake. A number of farms lie north of it and a number south, the river cut a part of it when it ran through there. I believe there is one farm that they farm a little on both sides. Don't know who owns it.

Redirect examination:

Don't pretend to testify as to titles to property.

Recross-examination:

I do know how many pieces of land, whoever they belong to, the lake cut through and a part is on one side and part on the other. I don't know as I ever seen steam boats come down through there but I remember the river. I know some steam boats run through there, did not see any but the channel of the river run through there. Couldn't testify when it was that the channel of the river run through there. The Missouri river ran through there since I have been a kid I have seen it. Don't know what time it ran through there. Don't know that the river has always ran down by Sioux

Point and on the Dakota side. The nav-gation might have gone along that channel in 1866 and '65. I don't know whether it did when Adam and Methuselah were small children.

HARRY NELSON recalled, on behalf of defendants, testified:

Yes sir am one of the engineers who made the survey of drainage district No. 2. Yes sir, investigated with reference to the best and most economical plan of draining this land. Didn't go into every detail of the advisability of a line of drainage in the swamp
224 on through Omaha creek, but we considered that when we made the other consideration; we considerad it in respect to the cost of construction and feasibility. We estimated it in this way that the distance through which we would have to go in order to carry water down south and east through the district would be about five times as long as the district running north and east and would require a large ditch to carry the water, so that the expense would be about five times the expense of running the dit-h as we have it planned. It would have to be a larger ditch because the fall through ten miles is very little different from the fall going a mile through two miles in distance on our grade line. The velocity of the water would be much less than we would have to have a larger ditch. I have never seen the Omaha creek running full but from reports that I have seen the Omaha creek is taxed now to its capacity in bringing the water of Elk creek to its outlet. I have had experience down near Tekamah on the Missouri bottom and in the Papillion district south and west of Everett creek and up through Millard and along in Sarpe county down near Gretna, Nebraska, emptying into the Platte. Yes some of these drainage projects have been completed and tested by actual carrying of water. Some are so situated that their characteristics are similar to the proposed ditch in Elk creek valley. Yes sir, it is feasible to drain the Elk creek by the porposed ditch as laid out, and the most ecoomincal way. Yes sir, am the engineer who assisted in preparing these plans. The plans are correctly set forth in the report of Towl Engineering Company in the profiles marked exhibit 38 and the plat marked exhibit 36. The plan will take care of all ordinary floods over the country. Yes sir, was present during the running of the line of the main ditch for Elk creek Cut Off. I did set stakes along the line of that
225 survey at fences and on the bank of the lake and at the roads marking the center lines. First stake set on the lake bank up on the high bank. Well there wasn't any brush. There was a little grass on the high bank, the stake was set out a ways from the plowed ground. Going in a southwesterly direction the next was on the fence west of it and on section 29. Yes sir, there was one then right on the line between section 29 and section 28; next stake on the north line of section 36. Next stake on the north and south center line of 36 and next stake right at the north side of the road in there. Yes sir, of the road running east and west of Jackson, next stake on the east line of the town of Jackson. Yes sir, it is on the east line of the platted portion of land in section 36, two blocks west where the street runs down to the Burlington depot. Yes sir, and then on

the railroad track. The south line of the right-of-way of the ditch and the north line of the right-of-way of the rail*road* are the same. Saw these stakes after they were set. Don't know about how long it was, it was when I went over the ground with the drainage board. Yes sir, at that time found all the stakes. Made other marks along the line. Some places blazed the fence posts where they were just short distance off the line so that I would know just about where to find the center line of the ditch if the stakes were removed. Then there were bench marks denoting the elevations. The datum line in making the elevation was on the cap of the bridge over Honey creek on the C., B. & *O.* railroad. It was not on the Burlington bridge over Elk ditch, it was on the bridge near to the initial point of the ditch. That was the datum line from which we carried all our elevations over the district. In making exhibit 50 we used the same datum line. The whole thing runs from the datum on the bridge. Was at Jackson lake March 31, 1911, and two or three days before that right along. Think I was there in January, 1911, and then carried a survey down through the chute. In March
226 took the levels through the territory north of the lake. Yes sir, went through that territory along the lake and know its general character. If Jackson lake would raise two feet from its present level the character of the land covered by the water would be sand, a wash soil that is similar to that washed up by the Missouri river, it is nothing but Missouri river sand. None of it is capable of cultivation as farm land in its present condition. The levels were correctly made. I was near the northwest end of Jackson lake on the 30th of March, 1911. The water was running from the river into that end of the lake at the time I was there between 8 and 9, I think it was. The water was running into Jackson lake from the Missouri river at about 4 o'clock. The stream right next to the high bank was about 50 feet across and there was some more water a little high land in between and a little more water, flowing in perhaps the same width. The water was coming over this traveled way in two different places. Yes sir, it was so I could see the water running clear from the river into the lake a continuous stream. I drove there and it came very near to the top of the buggy. A young boy up there at Jackson was driving with me. The water was running in on March 31.

Cross-examination:

Yes I made a survey of that drainage district. Exhibit 36 is the map that I made of it. That map is taken off from the original, that is a copy. To my knowledge that is the only map that has ever been filed here. Yes the ditch as shown on this map was laid out according to my survey. I think we also made a report concerning this ditch.

Redirect examination:

Yes have made a survey of the outlet and chute to the Missouri river and have levelled that and the land surrounding it on either

side principally to the north. The outlet of the chute is
227 sufficient to carry the water that comes down from the Elk creek ditch, derived that conclusion from the cross section we take along the outlet and the fall.

Recross-examination:

Yes sir, that is simply my conclusion based upon the calculation and experience I have had. Am 28 years old. Have had about four years experience.

Redirect examination:

Started in with drainage work in 1907 and my engineering course had been over that time from 1902 to 1905.

Recross-examination:

No sir, did not graduate. Did not start to carry chain along about 15 years old, was about 20 or 21 years old. The one stake on the lake bank if I remember correctly was a round stake about 10 to 20 inches above the ground, perhaps two inches in diameter, just a stake picked up on the bank; drove it in with an ax weighing about two pounds. Yes sir, sharpened it, it was right near the bank. Put nothing on it to indicate what it was, we put our blue keel mark, is all. The next one was back to the fence west of it, that was a pine stake, just a pine board from 12 to 15 inches long. Got it off the fence I think but could not state exactly. Didn't let all of them stick out 18 or 20 inches above the ground, the tallest one was at the lake bank. I hea-d Towl say as he remembered he thought it was a pine board about 4 inches wide. We did not stake out the width of the right of way at all.

Redirect examination:

Put cross section stakes in there only at the time of construction. The center line in the survey or laying out is the only thing that is staked.

228 Recross-examination:

I don't know when this practice began, it was that way when I worked for the railroad along the C., B. & Q. I laid the location in the Big Horn Basin for the C., B & Q. from Bison City to Thermopolis and through the canyon south into the Shoshone basin. No sir, not going through rock all along.

JOHN T. DALEY on behalf of defendants testified.

Am chairman of the board of supervisors of district No. 2 and have been over the line of the proposed Elk creek ditch a year ago last, January, I think. No survey made at that time. Sometime later on in the spring I think it was, I was there after the survey was made. The board went over it. The survey had then been made. We found stakes, there was a stake set at the bank of

the lake and another place I noticed a post marked along the road side. Yes sir the engineer showed me a tree that was on the line about the center of the line. A tree or brush. The land there is level. When you stand at Jackson you can see an object that is above ground at the lake bank unless buildings would be in the way. All the land between Jackson and the lake bank is in cultivation except some meadow, it is most all fenced. Yes, sir there are fences marking the line between the different tracts of the land. Yes sir, have been over this line since looking for stakes. The post that was marked is gone, we looked for that Wednesday. I was over to the lake once and looked for the stake and it was gone. Saw them shortly after the survey. Was at the head of Jackson lake about the 30th of March. I heard the water was running in there and went up to look at it. Was there about 3 o'clock. Saw Mr. Sullivan. At the head of the lake the water was about a foot deep and possibly 10 or 12 rods in width. There is no traveled road above the
229 lake there. I think you mean the road leading to the lake, it was running across there, I didn't measure it. Should judge it was 8 or 10 rods or more wide. Was not back the next day.

Cross-examination:

It was not a half mile to a mile there. I spoke about a fence post, it is east of Jackson on the main traveled road, on Heffernan's land. On the north side of the road. The third telephone pole west of Hall's house. The engineer showed me the mark where the ditch crossed the road. Did not see anything until he *hs*owed me. Would not have noticed it if someone had not pointed it out. Saw a bench mark. I was driving to town and I saw them making it. Nelson made it on the north side of Heffernan's land. Don't think a stranger would have noticed it. *Balz*ed on the south side, looked as though chopped 8 or 10 inches. He showed me where the road crossed. If I had not seen him I would not noticed a thing. Didn't see any stakes down the village of Jackson, none through there. I only saw one at the bank of the lake, that is all.

Redirect examination:

I was not quite at the head of the lake this spring a year ago. Was so I could see it very nearly a year ago last spring. Saw the water running in at the head and around through Jackson lake and over the high land. The whole high land was pretty nearly covered at that time by one solid body of water. Have no personal knowledge since then.

FRED C. SMITH on behalf of the plaintiffs on rebuttal testified:

Age 39, occupation civil engineer, residence Sioux City,
230 Iowa. The firm name is Smity & Finley. Have been an engineer about 24 years. Mr*fl* Wooley works under my supervision. I am not a graduate of any school. I began my engineering career in 1887 at Sioux City as helper in the city engineer's office. My experience has been mostly in the city engineer's office

in Sioux City and the general practice of surveying of all kinds, sewers, water works, and drainage of all kinds. I have been o- a number of drainage projects as assistant. There was the farmer's drainage district and I have made surveys along the Missouri river. With the exception on one year I have been devoting my attention to engineering for 25 years. I have examined the Towl Engineering Company's report of drainage district No. 2. I am familiar with the conditions around the Jackson lake country on both sides and up Elk creek. Have been for a long time. I have been making surveys in there for the last 6 or 7 years and I have known the country always. Have been all over Jackson lake and north of it. Yes sir, there is no ground to the foot of the hills from Honey creek east on the south side of their railroad trace. There are floods that come down Elk creek that I don't think a ditch 50 feet at the top, 15 feet deep and 30 feet at the bottom would take. Ordinarily it would. There are floods that come down that valley from one side to another I don't think any ditch would take those. If the water would not get into the ditch the natural course would be around the north of Elk creek and around down through the town of Jackson where the natural drainage is south. So it would probably go through the south and east. The ditch would overflow both ways. It would go north through the town of Jackson the same as it goes now. I have never dug a ditch on the 26 foot per mile grade. I have seen ditches in the same class of soil that have continually eroded since built. Such a ditch will erode rapidly. Yes frost would
231 aid erosion. It would widen the ditch, it undermines the softer material below and allows the upper material to fall in. Yes sir, a sand soil will do it quicker than a clay soil. The hard rock is the last that will erode. It would take more than a few such floods, probably to take out the ditch to any extent but a continual flow of water would undoubtedly widen the ditch but not to such a great extent on the lower end. Yes sir, 5,000 cubic feet per second is its capacity. If Jackson lake were raised two feet the water would extend up the proposed ditch probably 1,500 feet and be from two feet deep to nothing. If the ditch came down full 5,000 cubic feet per second and had this back water it would retard the flow, decreas- the efficiency of the ditch. You cannot fill up a ditch with 5,000 cubic feet per second and have a foot or two of water besides, it would spread over the ditch. With that point protected with dykes it would be up along the dykes. The soil banks will protect it as long as they last. They will not last as long as the original soil by any means. If the flood is heavy enough and the dykes are not heavy enough, one flood will wash them out. The water from Cut Off lake would seek its level and if Cut Off lake was at the top of the bank it would take it up the ditch from 500 to 1,000 feet above the Omaha railroad crossing, practically up to the Elk creek bridge; supposing 5,000 cubic feet of water in addition, most of it would go through the opening at the Omaha railroad and flood the land below. Six and a half feet at the bottom of the ditch would go up the ditch three quarters of a mile, it would decrease the efficiency of the ditch and retard the fall. The water would flow over. If

the flood gate at the C., B. & Q. railroad was properly constructed it would only let the water out when it was down, the water would escape down Elk creek. South of Jackson the country is quite low and the natural drainage is south and east.

232 T. J. STEELE on behalf of the defendants, testified.

Have lived at Sioux City, Iowa 15 years. Was one of the incorporators of the S. B. Cattle Company. Its principal property is some accretion land and high land up north of Jackson. Yes, am familiar with that land in there about Jackson lake, have known it about five years and been over it frequently. I am familiar with the conditions in the outlet from the lake to the river. The flood waters either go into the lake or out of the lake owing to the station of the rivers. It was my impression that the stage of the water in the lake changed with that in the river. The land is generally sand bar land. There is one place near where the buildings are that is high, the rest was made land. It is sand land, I believe it is not land that you would cultivate and put in crops, I have not been there for four years.

Cross-examination:

There were two seasons I think the river flowed into the lake at the upper end. At point marked 71.2 (plat exhibit 50) there were some buildings, and there is some land over in there that can be cultivated. We had it pretty well fenced and there is quite a bit of cross fencing and some alfalfa in there. I don't know how far back two feet would flood that land. I would not put my judgment against a civil engineer's who had measured it. Up to about 11 years ago I had never known anything about the country. I know what a meander line is but I don't know where the government meander line is. Yes, this is an old Missouri river bed.

Redirect examination:

During the time I was interested in that land I cannot say how many times it was flooded, several times, every year in fact. This cultivated land would run within half a mile I should say of the lake.

233 Recross-examination:

We were supposed to own all the land north of the lake. I don't know its present condition, I am speaking what I know about it.

FRED ANDERSON, on behalf of the defendants testified:

Live at Jackson; lived there last March on or about the last of March. I don't remember what I was doing. I remember driving a team onto the high land at the upper end of Jackson lake. I think it was in March, two surveyors were with me. Mr. Nelson was one of them. We went over in the morning, came back about five o'clock in the evening. When we came back the water was flowing over the road from the river into Jackson lake. It was about

two inches from the hub of the buggy. No sir, it just flowed over the road a little bit.

Cross-examination:

I don't know what day it was. We crossed down there on the road. When we went out in the morning the water had just commenced. It didn't go quite to the road. Yes, there is a sharp bank to the west there and a little low swale with some trees and drift wood and stuff in it, and then it rises up again next to the river. Yes the water was about 12 or 15 feet wide. It was not that wide in the morning but at 5 o'clock in the evening it was. I don't work for anybody. I have been working for Tom Sullivan. Talked with him about this matter last night. He told me to come down and talked with me about these things. He never told me how he found it up there. Yes, he said he drove down there. No sir, I did not know I was going to be here until Mr. Sullivan talked with me.

234 J. L. O'BRIEN, on behalf of the defendants, testified:

Have known Jackson lake 15 years. Have not been there often the last 5 or 6 years. I used to hunt quite a bit up there. Yes sir, I was up there a year ago the spring of 1910. I should judge at that time there was about 5 or 6 feet of water flowing in there out of the river. I couldn't see much land in across in the brush. I am acquainted with the conditions in Jackson lake and know that it raised and fell with the Missouri river. When there was a raise in the river there would be a raise in the lake and when the river went down the lake would go down. Every time the river would raise it would run into Jackson lake.

Cross-examination:

It is about a quarter of a mile from the Missouri river down to the point of the lake. There is no inlet to the head of the lake unless it would be in case of high water. Yes sir, on the west side there is a high bank and east of that high bank for three or four rods it is low and there is a road crossing there and people drive through there. I could not say how wide that draw is, I should judge about 6 rods. There was quite a flow of water in there last spring, I could not say how wide. No we did not have anything like that this year. We had higher water there some years ago. It does not flow in there every season like it did last year. Yes, it was all of 4 or 5 years since I had been there. Yes, 6 or 7 years all right. I was there this year about the 29th or 30th of March. Nobody was with me. I went up to see what the river was doing, I had not seen it for 6 or 7 years before. I live about 200 rods west of the river over in the hills. I work for myself. I rent a farm. I did not know I was going to come here as a witness until the other day. Tom Sullivan told me, I talked with him. It was along about
235 Tuesday or Wednesday that I talked with him about this case. I did not tell him I would come, the sheriff came last night.

The defendants offer in evidence exhibit 52 the deposition of James O. Wright.

Mr. WRIGHT testified:

Name James O. Wright, age 61. Permanent residence, Washington, D. C., temporary residence Tallahassee, Florida. By occupation a drainage engineer. Am chief engineer in charge of the drainage of the Everglades for the State of Florida. I was educated at Spiceland Academy, a Quaker school in Henry County, North Carolina. I am a graduate of the Central Law School of Indianapolis, Indiana. My education in drainage has been through private reading and in the school of experience. No, that school is not recognized by my profession as of high standing. I have followed my profession continuously since 1884. I was city engineer of Lafayette, Indiana, from 1882 to 1884. Was supervising drainage engineer with the United States department of agriculture from 1905 to 1910. The rest of my time I have been employed on drainage work as engineer in charge of numerous projects. With the exception of five years 1892 to 1897, during which time I constructed section C of the Chicago Drainage Canal, I have been engaged in the drainage of real estate including tile drainage, open drains of all sizes and the construction of levees and embankments. Had charge of hundreds of projects from small farm drains to large drainage districts embracing several hundred thousand acres. Yes I have examined drainage projects on the Missouri river bottom. I was in Dakota county, Nebraska, about March 1, 1906 as a drainage expert of the United States department of agriculture
236 to examine a plan for changing the course of Elk creek by diverting it from its present course to Cut Off lake. I made a report, it was as follows: "I examined the profiles and proposed route made by Martin Holmvig, surveyor of Woodbury Co., Iowa and another plan by J. M. Lewis, C. E. Sioux City, Ia., and from the engineering data secured from these plans, I decided the proposed route recommended was feasible and practicable and recommnded that an open ditch 20 feet wide on the bottom, 50 feet wide on top and 15 feet deep, with a fall of 1.14 feet per 1,000 would be ample to carry the water of Elk creek and would drain the land through which it would pass, and would prevent the overflow of the lands south and east of Jackson, through which the present channel of Elk creek now flows. That such a channel is the most economical way of taking care of the water of Elk creek and reclaiming the land now overflowed and damaged by said creek. I further reported that the cost of said improvement would be relatively small as compared with the resulting benefit; and that the lands lying east and north of Cut Off lake and on the Missouri river would not be injuriously affected or damaged, by the proposed change; and that Missouri river or Cut Off lake would not be damaged in any way by this proposed change. I further reported that in my judgment, this cut-off was the only feasible way of reclaiming the land lying south and east of Jackson which is now overflowed at times of heavy rains by Elk creek. Without this cut-off to divert the

water of Elk creek into Cut-Off lake, I think the cost of the channel of sufficient capacity along the present course of the creek emptying into the Omaha river at the south end of the drainage district would be prohibitive, as it would not in my judgment, fully reclaim the lands. I further reported that by diverting the water of Elk creek north of the railroad near Jackson and carrying it to Cut-
237 Off lake that the channel necessary to reclaim the lands south of the lake would be comparatively small and that by improving the old channel and digging some small lateral drains all the lands of the district south of the railroad can be reclaimed and made fit for agriculture at a comparatively small expense." This report was directed to the county commissioners of Dakota county. It was transmitted by mail to them. I made a plat (which does not appear in evidence.) Yes, I think the project was feasible. I have a profile which I have marked exhibit "B" and handed to the notary (profile does not appear in the bill of exceptions). The proposed plan is feasible, proper, efficient and the best way to carry the waters of Elk creek to the Missouri river and reclaim the lands southeast from Jackson from the Elk creek waters.

FRED C. SMITH, recalled, on behalf of the defendants, testified: In ordinary rain fall the proposed ditch would be ample but in excessive rain fall conditions, that are natural in this Elk creek valley, they will have trouble. It would take an elaborate protection to stop the erosion of the waste banks. I have heard all the evidence these maps and papers and am familiar with them. The route proposed will not at all times take care of the water. I do not mean to say that a ditch on that route cannot be constructed. It can be constructed if properly protected to carry all the water. The ditch can be dug as planned and it can be protected. I said the water would probably back up into Honey creek and then go down on the other side of the Burlington. Yes the ditch will relieve the situation. Yes sir, many projects are constructed for the purpose of partial relief. There will be relief there is no question about
238 that. I have been over that route or one similar to it once as an engineer. I remember the lines and levels and the report was made by Mr. Lewis. I don't remember telling Mr. John T. Daley that that was the best way to relieve this situation. I would say this, I have said that the proper way to get rid of the water from Elk creek was the quickest way into the Missouri river, that is a quick way if properly constructed. I have been down over the land south but never surveyed down there. I think the fall is about a foot or foot and a half to the mile. It would take a much larger ditch down in there than this to handle the same amount of rain fall. Roughly speaking three or four times the size. I remember testifying in the district court of Dakota county in a case between Mr. Gray and the Omaha Railway Company. I might have stated that the way to take care of that water would be to take it to Jackson lake. I am still of the opinion that the route to Jackson lake with an outlet would be a feasible one. At the time my surveys were made the conditions were altogether different on Jack-

son lake, at that time it had a clear outlet to the Missouri river which is now absolutely closed. Yes sir, it is filled up now. I took some levels in March and I found a level of a foot above the ice at one point, at the lowest I could find. If the water raised two feet and did not go out at the north it would run over there. I have known of probably three or four floods in Jackson lake and Elk creek district since I have known it within the last five or six years. I think two is the greatest in one year. I don't know how long it would take water flowing over the banks to wash out these levee banks. That is more or less speculation. Water running 24 hours would do a lot of damage through there if it got started. These banks will probably be 10 or 15 feet wide. They would be solid on top. Yes the inequality in the district will equalize. A stream always emphasizes its grade lines.

239 Redirect examination:

No sir, I cannot take Mr. Towl's report and his maps and other data and go upon this ground and make a definite location of that ditch.

Recross-examination:

It is absolutely impossible from -he report or any plat to locate that ditch. I don't care who the engineer or surveyor is he cannot locate it. It cannot be run out and staked where it belongs. If I were employed tomorrow I could not do that, not from that, no sir. There is a leaway of at least 2,000 feet on the bank of the lake where there is no tie at all. The ditch starts at the confluence of Honey creek with Elk creek with no definite point of starting, it follows the C. B. & Q. R. R. and angles to the north and east without any angle being given or degree of curve and runs in a northeasterly direction somewhere -n the section, and it cannot be located by that. I might by taking the scale locate it within 200 feet, but not any closer. Yes sir, 200 feet is as near as I can get. Yes sir, a person getting within 200 feet would be very lucky. They could vary more than 200 feet and still be within the requirements of that plat or description.

MICHAEL BEACOM on behalf of the plaintiffs on rebuttal testified. Age 70, have lived -n Dakota county 54 years. I know the country around Jackson lake. I was one of the appraisers. The others were Mr. Hanson and Mr. Voss. We went up to Jackson lake in the discharge of our duties. Mr. Hanson, Mr. Voss, Mr. Evans Mr. Leamer, Mr. Daley and Mr. Tom Sullivan went with me. No sir, we did not see any stakes or monuments or posts down near Honey creek
240 and Elk creek. These parties that were on the survey indicated to us where the right-of-way had been located. Mr. Evans and Mr. Daley I think they showed us. No stakes, no sir. Mr. Evans indicated the place where the ditch started, it was at the creek where it made the bend; that is all there was there, just the ground itself. No stakes or trees or bushes or anything of that kind.

Yes, all I know is what Judge Evans told me, then we started and went down parallel with the ditch, I suppose, until we got down to Mr. Sullivan's alfalfa patch where it begun to cross the Northwestern system; we parallelled the Burlington system down to where it made an angle in there and ran northeasterly to the lake. We did not see anything along the ground. They had an understanding that there was a pole over there about where the angle was on this patch called the Sullivan alfalfa patch. Before getting over from Honey creek down there there was nothing to indicate. Nothing like that there, Mr. Evans and Mr. Daley were showing us. No blazed trees or posts or stakes or anything like that pointed out to us. Yes sir, that is correct, all I know is what Judge Evans and Mr. Daley told me. After we got past the railroad at the angle we went up on the supposed line until we struck Jim Kennelly's. Of course, we had a map that showed the lots. No I did not see any stakes to show a survey, nothing to indicate to us. Yes sir, we took the statements of Mr. Daley and Judge Evans. We were not guided by any stakes or monuments. After looking at Jim Kennelly's place we started to go through Mrs. Cormick's ground, through her corn field; when we got on the road I don't remember what we did. I don't remember whether the automobile was on the road then or not. Yes sir, we did get into the automobile but I don't remember who was driving the automobile. There were two automobiles. We came down this section line road, the country road and went in on a road
241 between Heffernan's and Berry's lands. We circled around through that and came back and went into Henry O'Neill's. We were in an automobile when we were there, some of us got down there. We were looking at shocks of wheat. Referring to a round white spot marked 3, in exhibit 48 we did not walk over or go over this land until we went onto the land with the automobile, we did not walk over it. The observations we took was through an assertion of Mr. Daley's pointing out a telephone pole along the road and we stood up in the automobile and, of course, he says that is the way it went. I did not see anything on the pole. There might have been a mark on the pole but I did not see it from where I was standing. Mr. Daley did not point out any mark. He indicated a post we thought was somewhere about where the ditch would cross. There might have been a mark but I did not know. There was nothing there aside from what Mr. Daley told us to indicate a survey to my knowledge. Yes sir, what we did was according to what Mr. Daley said. I don't know who of the appraisers got out of the automobile, we may have stepped out for the purpose of taking a little stretch. We were examining the wheat, there was wheat in shocks. There were no stakes that I saw. Then we went up to the lake and got out there, yes all of us. We did not see any post or sign of a stake or anything of that kind. Mr. Evans and I looked for one. Yes others looked east of where we did. Judge Evans hunted for something on the same and I thought he was in such a hurry I hunted after him. We did not find anything, no sir. We searched the territory there somewhere maybe thirty rods any how, along where they supposed. No sir, there was no post or the slightest

indication on Harry O'Neill's land of the location of a right-of-way of any kind. No sir, I did not know of any definite or indefinite location there, or any other sign of this proposed ditch except what was told me by Mr. Evans or Mr. Daley.

242 Cross-examination:

Yes exhibit 53 is a map similar to the one we had with us that day. That is the same thing, yes sir. When we were on Mr. O'Neill's land Mr. O'Neill was there and Mr. Heffernan too. It was my understanding that there was a little question between Mr. O'Neill and Mr. Daley as to where the ditch was to come in. Yes standing there we could look to Jackson and see the buildings in Jackson. Yes, Mr. Daley said there was a telephone post or pole on the line of the ditch. No person tried to keep me from getting out. There was nobody insisted that we get out or stay in. No you could hardly put a stake down in the Elk creek in the middle. Yes we started over there and came down parallel with the railroad at the east end of Sullivan's land. One of the men got on the Omaha railroad and we were talking about the course it made, whether it would take all that patch. Yes sir, I understood that it left a little piece in the corner. Yes we had this map with us. Yes when we got to Mr. O'Neill's Mr. O'Neill and Mr. Heffernan were both with us. This land is all level. The land is of the same general character. We could see just as well and know just as much from where we stood and looked as if we had gotten out and walked, so far as the duties we were there to do were concerned. No Mr. O'Neill nor Mr. Heffernan did not ask us to get out and walk up there. When we went out on the road and came up between the Heffernan and Berry land we came into Mrs. Leahy's land, they were stacking there. Some went down to the east side and then came back to the center lien where the line of the ditch crossed the fence there, yes. Where they said the line crossed the fence. I could not see whether Mr. Daley was in that party. Then we went up over to the Henry O'Neill place and went up his fence where they said the line of the ditch was and ran on up pretty close to the lake and then they walked east to where we were looking for the stake. All that
243 was with us except you and I and Henry, and after that we met together on the side of the lake. I don't know that it was agreed as to where the terminal point was, there was a little difference. I don't know that Mr. O'Neill said that it did not make any difference any how just where it was. I don't remember anything about that conversation. I say nothign to indicate the terminal point of the ditch. If the ditch was moved to the right or left I understand the situation: that if it was moved east would increase the damage, it would take more land in there and if it was moved west it would take less land. Yes those were the only elements that would enter into the change. Yes this land along the ditch on both sides is of the same general character and value in my opinion.

Redirect examination:

I did not at any time know exactly where the center of that porposed ditch left the alfalfa patch and I did not know exactly the point it was to empty into Jackson lake and I never did know the exact points of the route on that ditch.

Recross-examination:

I know the route according to the map and the supposed information.

Redirect examination:

Yes sir, it is a fact, they walked up and down the bank of the lake looking for a stake. I do not know that they found the stake. No when we got at the point and looked down here there was nothing that showed just where to look. No sir, when we got to Jackson we could not tell whether it would be 200 feet this way or not. Yes sir, it was guess work. It was my assertion to O'Neill that there had been a mistake at one point or another. I said to Henry "it goes to the right more." Yes sir, that is that Henry had been mistaken in the place. I did not say anything about Daley. There was talk
244 about the line running so and so with reference to a tree, which could be seen with reference to the buildings down at Jackson. I think there was a box elder treee marked on the east forty of Henry O'Neill.

H. C. HANSON on behalf of the plaintiffs on rebuttal testified:

Live at Hubbard in this county. Have lived here a good many years. Was one of the commissioners to appraise the right-of-way with Mr. Beacom and Mr. Voss. I heard the testimony of Mr. Beacom. It is substantially as it occurred. I went up in an automobile, Yes. I did not find any stake. We were hunting for it. The line was pointed out by Evans and Daley. I knew nothing about that line except what was pointed out by those gentlemen and I acted upon what they stated as to where the line was. I did not see any marks to indicate the survey nor any posts nor anything of that kind.

Cross-examination:

Exhibit 53 looks like the same map we had along with us that day. A telephone pole was pointed out down on the road where the line of the ditch was to cross the highway east of Jackson. Yes, our attention was called to the fact that it crossed the center of the south line of that Leahy 40, some of us went down there. Yes we went back to the highway and came up around the Henry O'Neill fence, his west line. There was a little bush our attention was called to in the fence as where the line went through. Yes then we went up to the lake bank. I didn't hear O'Neill say where he thought it was. Yes we did look down towards Jackson for the purpose of looking back over the line we had talked of. We were up there two days. Yes sir, went back one day when Evans and Daley were not with us
245 and went over practically all of it again. I don't know all the persons with us we kept changing so much. O'Neill and

Heffernan were with us. Dr. Leahy was not with us very much. I know you were not along, nor Daley, nor Leamer, nor Glen Armour, nor C. H. Maxwell, nor Fred Bartels. Yes this land we went over was practically level. Nothing to obstruct the view in any direction, its general characteristics as to soil are the same.

Redirect examination:

Yes sir, the first day Judge Evans and Mr. Daley went with us. We could not have found this right-of-way by anything on the ground unless some one came along and told us. No sir, could not tell how far it was from the Burlington right-of-way. No I would not be sure if I had gone out there alone without the aid of this gentleman that I could have come within 500 feet of it down there. No sir, could not have struck it at all in that distance of 3,000 feet along Henry O'Neill's land unless we were told.

Recross-examination:

Yes we were governed by the plat and papers also and gave them due consideration. No sir, what Evans or Daley said to us did not have anything to do with the assessment of the damages.

Redirect examination:

No, I have no knowledge of what or where it was excepting what Daley and Evans told me. After we got out on the land we could not tell anything from the map. No sir, taking this map with us we could not have gone out on Mr. O'Neill's land and located the bottom at the center of the ditch.

HENRY O'NEILL recalled on behalf of plaintiffs testified on rebuttal:

246 Yes sir was over there with the commissioners to assess damages. Went over my land with them and down on the bank of the lake. They were looking to see if they could find a stake. I think Daley went down there, Evans went out this way. I thought the stake was on down toward the east, at least a stake there 5 or 6 years ago and when I got up further Evans says it was up that way. Mr. Heffernan was also looking and Daley and the other bunch was down that way. We talked about it. Evans, I think took out the map and he said it went in 29, I told him it didn't go in 29 I always thought they were further on down this way. I said the only thing to go by there was the fence, and that will bring you into 29. The fence that runs right straight east and west, it is an east and west line fence going along in here. No there was never any stake there. There was never any stake across my land that I saw. Six or seven years ago there was a stake at the lake, a little bit of a small stake. I know it was down there, I have seen it. Yes sir, that was an entirely different survey made by the county. There was no stake or indication of a survey that I saw. I looked for it. Yes, I heard Daley's testimony. I went over there yesterday with a couple of men and I did not see anything. Yes sir searching for

it. No sir, saw no blaze or post or anything like that, nor any blaze on a telephone pole, nothing to indicate a survey.

A. E. HEFFERNAN, recalled on behalf of the plaintiffs testified on rebuttal:

Yes I know all about this land on exhibit 48.

By the COURT: Let the record show exhibit 48 offered and received in evidence.

247 By Mr. EVANS: May exhibit 53 go in as a part of the cross-examination of Mr. Beacom and Mr. Hanson?

By Mr. ALLEN: Yes sir.

I remember when Mr. Beacom and Mr. Hanson and Mr. Voss came up there, I was on the ground. We came up by Mr. Hall's and then over to the lake. There was nothing done down there near a telegraph pole or anything of that kind that I saw. I was there. I did not see any pole with a mark on it or any fence post. Mr. Daley spoke about where he thought the line of the ditch was. I do not remember that he pointed out any blaze or mark on a post of any kind. When they came down where the telegraph post was they stayed in their automobiles and looked up and around. Mr. Daley and Judge Evans looked along there. O'Neill wasn't there then. After we got on Mrs. Leahy's land we got out of the automobile and kind of tried to get on the line if we could, on the line of the ditch where we supposed the ditch was. No sir, we couldn't find it. Nobody knew where it was. Mr. Evans tried to explain and so did Mr. Daley. We did not walk very far, we ran down a ways in the automobile and then turned around and came back to the highway. Then we went out to Henry O'Neill's to the lake and we got out again and tried to get in line if we could and look for a stake they claimed was supposed to be set in here somewhere. No we did not find any stake there or anything to indicate where the proposed ditch was to go into the lake. They were talking about the line getting it if they could, but could not find anything that would be satisfactory. Yes three of these commissioners were there. They had been through my field looking and I did not see any stake at all. No

248 sir, so far as the surveys of the land are concerned, I cannot tell whether there was a ditch located 500 feet north or south or whether right there. It would be pretty hard to find anything within four or five hundred feet of this proposed ditch. Unaided I could not find it, No sir.

HENRY EAGLE on behalf of the plaintiffs testified on rebuttal.

Am 60 years old, live northwest of town at what they call Brush Bend. Lived in this county since 1874. Know Cut Off lake. Know where Mary Heffernan's land is. Went out there yesterday with a view to finding stakes. John W. Ryan took us out in an automobile and stopped us in the road right by Hall's house, then we went out and down on the road for about four or five hundred yards east and west and looked for a stake, that went up and down by that fence and could not find any. Then we went across over the fence

and went through Heffernan's and Berry's and looked up and down on that fence a distance of about four hundred yards but found nothing. We went through the field zigzag until we struck out at the other fence and we looked that fence up and down and found no stakes; from there we went into O'Neill's field and went zigzag up towards the direction until we struck the lake and there we hunted on the lake over this fence from this fence up to the other fence, that is 80 rods and we hunted back and forth and went down below the bank and hunted for a stake and could not find it. We looked for a blaze or a cut on the fence post along there but could not find any. One went down on one side of the fence and one on the other. We did not find any three or four inch pine boards stuck in or lying in the grass, nothing of the kind.

249 FRED BECKER, on behalf of the plaintiff- on rebuttal, testified.

Age 45, live at Brush Bend. Yes sir, know all this country and the Jackson lake country. Yes, that is all fenced and has been for years. Yes sir, I went out yesterday after hearing some of the testimony of Mr. Daley for the purpose of finding posts that was cut with any blaze or anything of the kind, or posts or pine boards driven into the ground along the fences or fence intersections. Mr. Ryan drove us out. We went out to Mr. Hall's corner up to the east and west line and there started on the east side of his house and walked up toward Jackson very nearly to Dr. Leahy's house and examined the fence on each side, looked at each post. There were no cut places on them, and no cut places on the telegraph post. There were no stakes or poles or anything along in there. We took every fence north and south and the fences both east and west and made a thorough examination going on each side of the fences. We did not find any tree or shrub or brush or stake or pine board there anywhere either in the ground or lying around there. No, not any stake or anything on the lake bank. We walked the full length of the lake and down below.

By Mr. EVANS: As to section 29 in 29 and 8 it is admitted that the land is in the name of Henry O'Neill and that Agnes Swift has no interest therein. This refers to the land south of Cut-Off lake.

By Mr. ALLEN: All our exhibits were offered in evidence.

By Mr. EVANS: I think every exhibit that has been identi-
250 fied has been offered by one side or the other. It is conceded that all exhibits by whichever side from 1 to 53 inclusive, go in subject to the objections made.

Plaintiffs rest.

L. F. LEAMER, recalled on behalf of defendants, testified:

I was out on the line of the Elk creek ditch from Jackson to Jackson lake prior to the condemnation proceedings. I saw a stake on the lake bank. There was a bush marked between that and a post up on the road that goes into Jackson blazed. The stake at the lake was on the edge of the bank. It looked like a willow about two inches in diameter or something like that. About two feet

out of the ground. The board of supervisors and the engineer Nelson were with me at that time. The post my attention was called to was blazed. Yes sir, that was on the road that goes into Jackson where you go up on Henry O'Neill's line fence.

J. B. DALEY, recalled on behalf of the defendants, testified: I heard the evidence of Mr. Lemaer. On the day of condemnation after we left Jackson there was a post on Mr. Heffernan's land east of Jackson that was blazed by the engineer which he had showed me. We had him stop there and look back and hit on the line. Then next we went into Mrs. Leahy's, first into Mr. Heffernan's meadow and from there into Mrs. Leahy's forty and looked that over. On the Leahy forty we located the ditch in the center of the south lien and all of us that wished had the opportunity to go
251 to that point. We were probably 20 minutes or half an hour going round that forty. Some of them went to the east line of the forty to the place where the ditch crosses. When we were back on the road I showed them the blazed post, it looked about an 18 foot pole. We could not find any stake at the lake. I pointed out the place where my recollection was that the stake was. There was a bush at the first fence where the engineer had told us there was a stake. Yes sir, that was pointed out to them. And that was along the line of the ditch as I had found it originally. Yes sir, the appraisers were left alone so far as the drainage district was concerned.

HARRY NELSON recalled on behalf of the defendants, testified: It was in January, 1910, that I drove these stakes along the line of this ditch. If the stakes have not been moved I can find the ditch and if not I can find it from the notes in the field book. I never drove any of those stakes down myself. Never pulled up or put down any of those stakes myself.

Both sides rest.

252 And afterwards, to-wit, on the 21st day of March, 1913, the following among other proceedings were had and done in said supreme court of the State of Nebraska, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913.

M'CH 21.

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

* * * * * * *

No. 17695—O'Neill v. Leamer—Appeal from Dakota County.

* * * * * * *

M. B. REESE,
*Chief Justice*

And afterwards, to-wit, on the 17th day of May, 1913, there was rendered by said supreme court of the State of Nebraska and entered of record upon the journal thereof a certain judgment in the words and figures following to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913.

MAY 17.

No. 17695.

HENRY W. O'NEILL et al., Appellants,
v.
JACOB F. LEAMER et al., Appellees.

Appeal from the District Court of Dakota County.

This cause coming on to be heard upon appeal from the district court of Dakota county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth
253 find no error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed; that appellees pay all costs incurred herein by them, taxed at $—, and have and recover from appellants all their costs so expended; that appellants pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

M. B. REESE,
*Chief Justice.*

And on the same day there was filed in the office of the clerk of said supreme court a certain opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

No. 17695.

254 O'NEILL
v.
LEAMER.

*Opinion. Filed May* 17, 1913.

1. When the petition filed for the formation of a drainage district, under art. IV, ch. 89, Comp. St. 1909, and the proceedings thereunder are sufficient to give the district court jurisdiction of the subject matter, and an order is entered therein declaring the organization a public corporation of this state as provided in the third section of that act, the supervisors of the district duly elected, cannot be enjoined from proceeding with the work for which the district was organized on the ground of irregularities in the organization thereof.

2. A drainage district organized under art. IV, ch. 89, Comp. St., 1909, is a public corporation.
3. When a public corporation is organized for subordinate governmental purposes, such as a village, township, city, or drainage district, it is not necessary that all of the people embraced within the corporate limits should consent to incorporation. The legislature has power to provide for such incorporation by the required number of inhabitants and property owners therein without the unanimous consent of all.
255 4. Condemnation proceedings are allowed under said statute (section 12) when the "board of supervisors are unable to agree with the owners" of the property. When the condemnation proceedings and the work thereunder are enjoined on the ground that the drainage district has no legal organization and that no right exists to take the land for such purpose, and there is no evidence that the plaintiffs seeking the injunction are or ever have been willing to grant the right of way upon any terms, it sufficiently appears that the parties cannot agree.
5. If lands not taken by the condemnation proceedings are damaged by the improvement, the law provides an adequate remedy. The owners of lands so damaged are not entitled to enjoin the prosecution of the work on the sole ground that the damaged lands are not included in the condemnation proceedings.
6. Under the statute in question a district may be formed for the purpose of having swamp and overflowed lands "reclaimed and protected from the effects of water, by drainage or otherwise." Section 1. To provide a drain to prevent water from flowing on to swamp lands is to protect such lands from the effects of water as contemplated by this statute.
256 7. The supervisors must file a petition for condemnation "setting forth the location and character of the right of way needed and describing the lands to be crossed." Section 12. If a petition is filed in county court showing the starting point of the proposed ditch and the lands it will cross, stating the government subdivisions, it is sufficiently definite in that regard to give the county court jurisdiction to appoint the appraisers, and if the damages assessed by the appraisers and the orders of the court thereon are not appealed from they are not subject to collateral attack on the ground that the location of the ditch is not sufficiently set forth in the petition.

257 SEDGWICK, *J.*:

These defendants and other citizens of Dakota county applied to the district court for that county to organize a drainage district under the provisions of art. IV, ch, 89 Comp. St. 1909. The court made the order organizing the district under the title of Drainage District No. 2 of Dakota County, Nebraska. Afterwards, these defendants were chosen as supervisors of the district and began con-

demnation proceedings in the county court of Dakota county to obtain a right of way to their drainage canal across lands of these plaintiffs. The plaintiffs then began this action in the district court for Dakota county to enjoin the defendants from proceeding further to construct the ditch across the plaintiffs' land. Upon trial the court found in favor of the plaintiff, Elizabeth Leahy, and against the plaintiffs, O'Neill and Heffernan, and entered a decree dissolving the temporary injunction as to the last two named plaintiffs and the plaintiffs O'Neill and Heffernan have appealed.

The pleadings are lengthy and involved, and far as we can see, contain a considerable unnecessary and immaterial matter. A large number of questions are presented and discussed at length by the appellants but we feel constrained to confine our discussion to the more important ones. The plaintiffs contend that the drainage district was not regularly organized and seem to insist that the proceedings were so defective that the court was without jurisdiction and the district is not even a de facto corporation. The ob-
258 jections suggested, however, relate to supposed defects in serving of notice on some of the parties interested in the formation of the district and other similar matters, none of which are of sufficient importance to affect the jurisdiction of the court or subject its judgment to this collateral attack.

The objection that the order incorporating the district was erroneous because some of the property included in the district was not sufficiently described might have been raised upon the hearing of the petition for the formation of the district and upon appeal from the order but cannot be insisted upon in this collateral proceeding.

Another contention of the plaintiffs is that under our statute a drainage district is not a public corporation, and that the attempt to give it the power of eminent domain is unconstitutional. The argument upon this point is interesting, but in view of the fact that this question has heretofore been fully considered by this court and determined adversely to the contention of the plaintiffs, and that the legislature has from time to time for may years past established and declared a public policy which is inconsistent with the view that these organizations are purely private corporations, and in view of the fact that other questions presented in this case are not so well settled and will require somewhat lengthy discussion we do not consider it advisable to review the grounds of our former decision. Neal v. Vansickle, 72 Neb. 105; Barnes v. Minor, 80 Neb. 189; State v. Hanson, 80 Neb. 724; Drainage District No. 1 v. Richardson County, 86 Neb. 355, 365.

259 The plaintiffs contend that it is not within the power of the legislature to authorize a portion of the property owners in a proposed drainage district to force others in the district to consent to the incorporation and to "bear the burden and liabilities of such an organization." No authorities are cited upon this proposition and we doubt whether any can be found. The same objection would apply to the organization of counties, townships, villages and other similar subordinate public corporations.

It was also objected that there was no lawful attempt by the drain-

age district to agree with the plaintiffs as to a right of way over their lands, before beginning the condemnation proceedings. One of the parties interested in this land testified that the attorney for the district offered $150 per acre for the land appropriated and, "I don't think I accepted it; I think I said I could not accept it. I don't remember what I said." It appears from the plaintiff's petition and the evidence that the officers of the district were made to understand that these plaintiffs resisted the right of the district to purchase a right of way across the land. None of the parties interested testified that they were ready and willing to grant a right of way. The appraisers appointed by the county court fixed the amount of the condemnation money and there is no serious objection to the amount so fixed as unjust or unreasonable. The briefs of the plaintiff- do not refer to any evidence of that nature. There is therefore no merit in this objection.

260 The plaintiffs contend that the condemnation proceedings were void because they do not condemn and take certain lands of the plaintiff O'Neill which would be flooded by the waters of the ditch. If the plaintiffs' lands, other than those taken by the condemnation proceedings, are damaged by this improvement, the law affords them a remedy including the right of appeal to the court of last resort. The statute provides that "the same proceedings for condemnation of such right of way shall be had in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act." Section 12. The law is well settled in such case by many decisions of this court. When the remedy at law is adequate the prosecution of the work cannot be delayed by injunction.

Another contention on the part of the plaintiffs is that a drainage district has no power to condemn and take the land of a private citizen for the purpose of constructing a ditch outside of the district and to "take water before it reached the swamp or submerged lands within the district and carry it across the private property of a private citizen and empty it into a private lake." It is not seriously contended that the proposed ditch will "empty it into a private lake." Campbell v. Youngson, 80 Neb. 322, and upon rehearing, 82 Neb. 743, is cited, but that case construed another statute. The statute controlling in the case at bar provides that a district

261 may be formed for the purpose of having swamp or overflowed lands "reclaimed and protected from the effects of water, by drainage or otherwise." Section 1. This language clearly covers this objection.

It is objected that the application for condemnation did not describe and locate the proposed ditch with sufficient accuracy. The statute requires that when the supervisors "have agreed upon a location or route for said ditch or ditches and formulated a plan for the other improvements contemplated, then they * * * may present to the judge of the county court of the county in which said land, easements or franchise are situated, a petition setting forth the

location and character of the right of way needed and describing the lands to be crossed." Section 12.

The application for condemnation described the proposed right of way over each government subdivision of the lands of these plaintiffs substantially as follows: "A right of way 200 feet in width, being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located, over and across lot 4 or the southeast quarter of the southeast quarter of section 29, township 29, range 8, being 5.8 acres, Henry W. O'Neill, owner." The starting point appears to be definitely stated in the petition. The evidence shows that the line of the pr-posed ditch was definitely located by the surveyors and was marked with stakes. When the drainage board went over the land the stakes were still in place. Some of them were missing when the appraisers viewed the land. The drawings, which the appraisers had, showed the exact location of the
262 proposed ditch. There is nothing to indicate that the appraisement of damages was in any way affected by any supposed uncertainty as to the location. The county court had power to correct any irregularities in the method of appraisement. If by reason of the difference in the statute from that construed in Trester v. Missouri P. R. Co., 33 Neb. 171, that case is not to be regarded as decisive of the case at bar upon this point which we do not decide, it seems clear that the application was sufficiently definite to give the county court jurisdiction of the proceedings. Errors, if any, not affecting the jurisdiction of the court should have been corrected in that court or upon appeal.

We have not found any errors in the record requiring a reversal of the judgment of the district court. It is therefore

Affirmed.

Fawcett and Hamer, JJ., not sitting.

263 And afterwards, to-wit, on the 23rd day of June, 1913, there was filed in the office of the clerk of said supreme court a certain motion for rehearing in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

No. 17695.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Plaintiffs and Appellants, and ELIZABETH LEAHY, Plaintiffs,

v.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLEN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

*Motion for Rehearing.*

Now come Henry W. O'Neill and Cornelius K. Heffernan, plaintiffs and appellants and move the court to vacate and annul the decision heretofore rendered in this case and to grant a rehearing and re-examination of the case for the following reasons:

1. Because the court did not properly consider or determine the first assignment of error.

2. Because the court declined to consider or determine the second assignment of error.

3. Because the court declined and failed to consider the third assignment of error.

4. Because the court improperly decided the fourth assignment of error.

5. Because the court improperly decided and determined the fifth assignment of error.

264 6. Because the court improperly decided the sixth assignment of error.

7. Because the court improperly decided the seventh assignment of error.

8. Because the court improperly decided the eighth assignment of error.

9. Because the court improperly held that this case was a collateral and not a direct attack upon the corporate existence of so-called Drainage District No. 2.

10. Because the court in deciding and determining that Drainage District No. 2, so-called, was and is a corporation under the laws of Nebraska, and clothed with authority to exercise the right of eminent domain.

11. Because the court erred in ruling that the so-called Peabody drainage district act is constitutional.

12. Because the court erred in holding that the district court of Dakota county had jurisdiction to create a corporation by judicial order or judgment.

13. Because the court erred in holding that a majority in interest of those owning land in the proposed drainage district, and not a majority of the legal voters therein had a right to incorporate all the lands therein and thereby create a corporation.

14. Because the court erred in holding that the ruling of the district court that the right of way, of Drainage District No. 2, so-called, was sufficiently described and definitely located on the land of the plaintiffs and appellants.

15. Because the court erred in holding that there was an attempt on the part of the defendants to agree with the plaintiffs as to the acquisition of the right of way over the lands before con-

265 demnation proceedings were had.

16. Because the court erred in holding that the alleged condemnation of the plaintiffs' lands was sufficient to authorize the defendants to dig a drainage canal thereon.

17. Because the court erred in holding and ruling upon other vital points in the case.

18. Because the court erred in failing and refusing to decide pertinent and vital points presented in the pleadings, in the testimony and in the bill of exceptions and necessary to a proper adjudication of the rights of the plaintiffs and appellants, all of which are

fully set forth in the printed argument in support hereof, accompanying this motion.

M. D. TYLER,
WILLIAM V. ALLEN, AND
WILLIAM L. DOWLING,
*Attorneys for Henry W. O'Neill and Cornelius K. Heffernan, Plaintiffs and Appellants.*

Endorsed: 17695. In the Supreme Court of Nebraska.—Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer et al., Defendants and Appellees.—Motion for Rehearing. No. 17695.—Supreme Court of Nebraska.—Filed Jun- 23, 1913.—H. C. Lindsay, Clerk.—Allen & Dowling, Lawyers, Madison, Nebraska.

And afterwards, to-wit, on the 26th day of September, 1913, there was rendered by said supreme court and entered of record upon the journal thereof a certain order in the words and figures following, to-wit:

266 Supreme Court of Nebraska, September Term, A. D. 1913.

SEPT. 26.

No. 17695.

HENRY W. O'NEILL et al., Appellants,
v.
JACOB F. LEAMER et al., Appellees.

Appeal from the District Court of Dakota County.

This cause coming on to be heard upon motion of appellants for a rehearing herein, was submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

M. B. REESE,
*Chief Justice.*

267 SUPREME COURT,
*State of Nebraska, ss:*

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered 1 to 266 inclusive, are a true, full and complete transcript of the record and proceedings so far as requested by attorneys to be made for transmission to Supreme Court of the United States, in the case of Henry W. O'Neill et al. vs. Jacob F. Leamer et al., No. 17695, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Lincoln, Nebraska, this second day of December, 1913.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
*Clerk Supreme Court of Nebraska,*
By VICTOR SEYMOUR, *Deputy.*

268 And afterwards, to-wit, on the 25th day of October, 1913, there was filed in the office of the clerk of said supreme court, certain assignments of error and prayer for reversal of judgment, the original of which is as follows:

269 In the District Court of the United States of America.

HENRY W. O'NEILL and CORNELIUS K. HEFFERNAN, Plaintiffs in Error,

vs.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants in Error.

*Assignment of Errors and Prayer for Reversal of Judgment.*

Now come the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, by William V. Allen their Attorney, and, in connection with their petition for a writ of error filed herein, make the following assignments of error, which they aver occurred and took place upon the hearing and trial of this case, to-wit:

1. The district court of Dakota county erred in rendering a judgment in this case in favor of the defendants Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, and against the plaintiffs in error, and the supreme court of Nebraska erred in adopting, affirming and giving force to said judgment; to which the plaintiffs in error excepted.

2. The supreme court of Nebraska erred in overruling the motion and application of the plaintiffs in error for a rehearing of this case in that court and in refusing to rehear the same, and in refusing to reverse the judgment of the district court of Dakota county; to which the plaintiffs in error excepted.

3. The supreme court of Nebraska erred in refusing to sustain the plaintiffs' first assignment of error in that court to the effect that the district court erred in denying the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan the relief prayed in their petition and in dissolving the injunction and dismissing the plaintiffs' said suit; to which the plaintiffs in error excepted.

270 4. The supreme court of Nebraska erred in refusing to sustain the second assignment of error of the plaintiffs in error made in that court to the effect that the district court of Dakota county erred in holding, adjudging and ruling that so-called Drainage District No. 2 was a public corporation and as such clothed with

the constitutional power to exercise the right of eminent domain and to take and condemn the lands of the plaintiffs in error through and across which to dig and permanently establish a drainage ditch or canal, as said holding, judgment and ruling were and are in violation of that part of section 1 of the 14th Amendment of the Constitution which provides, among other things, that: "No state shall make or enforce any law which * * * shall * * * deprive any person of * * * property without due process of law"; to which said holding, judgment and ruling the plaintiff in error excepted.

5. The supreme court of Nebraska erred in holding, adjudging and ruling and in entering a judgment herein to the effect that the district court of Dakota county was clothed with constitutional authority and could and did by its order to that effect, create and make so-called Drainage District No. 2 a public corporation and clothe it with power and authority to exercise the right of eminent domain and take the property of the plaintiffs in error described in the petition in this case, as such holding, judgment and ruling were in violation of that part of section 1 of the 14th Amendment of the Constitution, which provides, among other things, that: "No state shall make or enforce any law which shall * * * deprive any person of * * * property without due process of law"; to which holding, judgment and ruling the plaintiffs in error excepted.

6. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the judgment of the district court in this case to the effect that the provision of chapter 161 of the Laws of Nebraska for the year 1905, as amended by chapter 147 of the Laws of Nebraska for the year 1909, which pretended to authorize and empower said district court to order, adjudge and decree
271 said so-called Drainage District No. 2 a public corporation with authority as such to exercise the right of eminent domain and to take, seize and condemn the property of the plaintiffs in error, because said holding, judgment and ruling and said act of the Legislature of the state of Nebraska, are in violation of that provision of section 1 of the 14th Amendment of the Constitution, which provides that: "No state shall make or enforce any law which shall * * * deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and are also in violation of that part of section 4, article 4 of the Constitution, which provides, among other things, that: "The United States shall guarantee to every state in this union a republican form of government * * *"; to which holding, judgment and ruling the plaintiffs in error excepted.

7. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the judgment of the district court of Dakota county, to the effect that the perpetual overflow of the forty (40) acre tract of land designated and described in the pleadings, evidence and proceedings in this case as lot five (5), and the property of the plaintiff in error Henry W. O'Neill, was not taken by said so-called Drainage District No. 2 in violation of that part of section 1 of the 14th Amendment of the Constitution which provides,

among other things, that: "No state shall make or enforce any law which shall * * * deprive any person of * * * property without due process of law", and in holding, adjudging and ruling that said taking was not in violation of said provision of the Constitution and could not be prohibited by the writ of injunction; to which holding, judgment and ruling the plaintiffs in error excepted.

8. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the judgment of the district court of Dakota county to the effect that section three (3), chapter 161 of the Laws of Nebraska for the year 1905, which attempts and professes to confer on said district court authority to create a drainage
272 district a body corporate and politic, was not in violation of section one (1), article two (2) of the Nebraska Constitution which reads, that: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted", and therefore void, because the same is in violation of said provision in so far as it attempts to authorize the district court to create a corporation and body politic of said so-called Drainage District No. 2 as the creation of such a corporation and body politic is a legislative and not a judicial function, and the creation of said so-called Drainage District No. 2 a corporation by the order or judgment of said district court was the exercise of a legislative and not a judicial power, and, therefore, was in violation of that provision of the Constitution of the United States which declares that: "The United States shall guarantee to every state in this union a republican form of government * * *"; to which holding, judgment and ruling the plaintiffs in error excepted.

9. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court of Dakota county to the effect that the defendants were the officers and agents of so-called Drainage District No. 2 and as such clothed with authority and power under the constitution of Nebraska and that of the United States of America, to invade the plaintiffs' property, described in the petition, and dig and construct thereon a drainage ditch or canal, and to perpetually carry the waters of Elk creek over and across the same and empty the same into Jackson lake, and to do anything to the injury of the plaintiffs' said property, and that in permitting said so-called Drainage District No. 2 to do so, is and was a violation of section 21, article 1 of the constitution of Nebraska, which provides, among other things, that :"The property of
273 no person shall be taken or damaged for public use without just compensation therefor," and of section 1 of the 14th Amendment of the Constitution of the United States, which provides, among other things, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws"; to which holding, judgment and ruling the plaintiffs in error excepted.

10. The supreme court of Nebraska erred in holding, adjudging and ruling, and sustaining the judgment of the district court of Dakota county to the effect, that the act of the Legislature of Nebraska for the year 1905, entitled "An Act for the organization and government of drainage districts, etc.' consisting of thirty-nine sections, approved March 29, 1905, and comprising a part of the laws of Nebraska for the year 1905, and the subsequent act of the Legislature of Nebraska for the year 1907 entitled "An Act to provide for drainage districts to drain wet lands, etc." approved March 27, 1907, consisting of thirty-two sections and comprising a part of the Laws of Nebraska for the year 1907, were valid and not in violation of section 1, article 11*b* of the constitution of Nebraska entitled "Miscellaneous Corporations," which reads, that: "No corporation shall be created by special law, nor its charter extended, changed or amended, except those for charitable, educational penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed," as said legislative acts attempt to confer upon the district court jurisdiction, authority and power to create, by its order, or judgment, a corporation, and said legislative acts are also in violation of section 1, article 2 of
274 the constitution of Nebraska, which provides that: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted," as the same attempt to confer upon the district court jurisdiction, authority and power to organize said so-called Drainage District No. 2 of said county, which is a legislative and not a judicial power; to which holding, judgment and ruling the plaintiffs in error excepted.

11. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that sections 14, 15, 16 and 17 of an act of the Legislature for the year 1905, entitled "An Act for the organization and government of drainage districts, etc."; approved March 29, 1905, are constitutional and valid, because the same are unconstitutional and invalid under the provisions of the constitution of Nebraska set out and copied in paragraph two (2) of the plaintiffs' reply, and are and were invalid under section 1 of the 14th Amendment of the Constitution of the United States of America in so far as said section 14 of said act requires the plaintiffs, or any of them, to make application in writing to the board of supervisors of so-called Drainage District No. 2 for compensation and damages sustained by reason of any proceedings, or steps taken by said so-called Drainage District No. 2 under said act, and in so far as the said act requires the plaintiffs in error to file any objections which they might have to the pro-

posed assessment as pleaded in the third (3) paragraph of the plaintiffs' reply; to which holding, judgment and ruling the plaintiffs in error excepted.

12. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court of Dakota county, to the effect that the defendants, or so-called
275 Drainage District No. 2 was constitutionally authorized to gather up and take the waters of Elk creek before they reached the submerged lands in said so-called Drainage District No. 2, and carry them through a drainage ditch, or canal, to be dug across the lands of the plaintiffs in error, not situated or being in said so-called Drainage District No. 2, to Jackson lake, and there empty them into said lake and onto the lands of the plaintiff in error, Henry W. O'Neill, and thereby perpetually submerge the forty (40) acre tract of his land known as lot five (5); to which the plaintiffs in error excepted.

13. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court, to the effect that Jackson lake was and is a body of public water, and that, therefore, the water of Elk creek might be taken by so-called Drainage District No. 2, by a drainage ditch, or canal, to be constructed upon and across the lands of the plaintiffs in error, and emptied into said lake, and thereby permanently submerge the lands of the plaintiff in error, Henry W. O'Neill, and that he was not entitled to receive compensation therefor, as the same was and is in violation of that part of section 1 of the 14th Amendment of the Constitution of the United States, which provides, that: "No state shall make or enforce any law which shall * * * deprive any person of * * * property without due process of law"; to which holding, judgment and ruling the plaintiffs in error excepted.

14. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining and affirming the judgment of the district court, to the effect that the defendants had fully complied with the laws of the state of Nebraska in endeavoring to make an accommodation and settlement with the plaintiffs in error before instituting condemnation proceedings, and in holding, adjudging and ruling that the line of definite location of said proposed drainage ditch was definitely located by a legally organized and duly
276 constituted body of men in compliance with the statute in such cases made and provided; to which holding, judgment and ruling the plaintiffs in error excepted.

15. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that said district court did not ere in adjudging that so-called Drainage District No. 2 was a legally organized public corporation not in violation of section 1, of the 14th Amendment of the Constitution of the United States, as said error was assigned in said supreme court; to which holding, judgment and ruling the plaintiffs in error excepted.

16. The supreme court of Nebraska erred in holding, adjudging and ruling that the district court did not ere in sustaining the action

and proceeding of the defendants in attempting to take the property of the plaintiffs in error described in the petition for drainage ditch purposes, and that said proceeding was a definite location of the proposed drainage ditch, or canal, and was a sufficient compliance with the statute, as said error is and was assigned in said supreme court; to which holding, judgment and ruling the plaintiffs in error excepted.

17. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court, to the effect that there was a lawful attempt by the defendants and by said so-called Drainage District No. 2, to agree with the plaintiffs in error as to the acquisition of a right of way over their said lands described in the petition, before instituting condemnation proceedings, which said error was assigned in said supreme court; to which holding, judgment and ruling the plaintiffs excepted.

18. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that the county court of Dakota county, Nebraska, had jurisdiction to appoint appraisers in this case to locate, condemn and take a right of way for said so-called Drainage District
277 No. 2 over and across said lands of the plaintiffs in error described in the petition, on the petition of said so-called Drainage District No. 2 before the board of supervisors of said so-called Drainage District had made an ineffectual attempt to come to an accommodation or to reach an agreement with the plaintiffs in error respecting the same; to which holding, judgment and ruling the plaintiffs in error excepted.

19. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that the defendants' proceedings were not void by reason of a failure to take and condemn a right of way across the land of Elizabeth Leahy, and to take and condemn a right of way across the land of the plaintiff in error, Henry W. O'Neill, north of said Jackson lake, known as lot five (5), which was to be permanently taken and flooded thereby; to which holding, judgment and ruling the plaintiffs in error excepted.

20. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that said so-called Drainage District No. 2 had a right to take and condemn the lands of Henry W. O'Neill and Cornelius K. Heffernan, the plaintiffs in error for the purpose of constructing thereon a permanent drainage ditch outside of the limits of said so-called Drainage District No. 2 and to take the water from Elk creek and flood water before it should reach the submerged or swamp lands in said so-called Drainage District and carry it, through a drainage ditch, or canal, permanently across the said property of the said plaintiffs in error and to empty it into Jackson lake, which was private property of the plaintiff in error, Henry W. O'Neill; to which holding, judgment and ruling the plaintiffs in error excepted.

21. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to

the effect that the pretended right of way of said so-called
278 Drainage District No. 2 over and across the lands of the plaintiffs in error, described in the petition, was sufficiently described and definitely located upon the lands of the plaintiffs in error; to which holding, judgment and ruling the plaintiffs in error excepted.

22. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that the alleged condemnation by the defendants of the plaintiffs' lands described in the petition, was sufficient to authorize the defendants to dig or construct thereon a drainage canal in the interest of said so-called Drainage District No. 2 and to be and operate as a permanent easement thereon; to which holding, judgment and ruling the plaintiffs in error excepted.

23. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court, to the effect that the Nebraska Legislature was clothed with constitutional authority to enact said statutes or laws depriving persons living within the boundaries of said so-called Drainage District No. 2 but not owning real estate therein, from petitioning for or remonstrating against the organization of said so-called district, or from voting for or against the organization thereof, or in any manner participating in its proceedings, because said statutes of the Nebraska Legislature, in so far as they confined said right to one vote on each proposition to be voted for each acre of land or a fraction thereof, and for each platted lot which he may own, or have an easement therein, as shown by the official records of the county where said land, or lots may be, were and are in violation of section 22, article 1 of the Constitution of Nebraska, which provides, that: "All elections shall be free and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise" and of section 1 of the 15th Amendment of the Constitution which provides, that: "The rights of citizens of the United States to
279 vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude"; to which holding, judgment and ruling the plaintiffs in error excepted.

24. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that the plaintiffs in error had no right to question or bring into litigation in this case, the fact that so-called Drainage District No. 2 was not petitioned or voted for by a majority of the legal voters residing within said proposed drainage district; to which holding, judgment and ruling the plaintiffs in error excepted.

25. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that the alleged condemnation of the plaintiffs' lands was sufficient to authorize the defendants, or so-called Drainage District No. 2, to dig or establish thereon a drainage canal; to which holding, judgment and ruling the plaintiffs in error excepted.

26. The supreme court of Nebraska erred in holding, adjudging

and ruling and in sustaining the judgment and findings of the district court, to the effect that the plaintiffs in error, by failing to appeal from the findings of the appraisers appointed to value the lands of the plaintiffs in error taken for drainage ditch purposes, made said findings valid and subsisting proceedings for the construction and maintenance of said proposed ditch; to which holding, judgment and ruling the plaintiffs in error excepted.

27. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the finding and judgment of the district court to the effect that said Drainage District No. 2 has a legal right in case of failure to agree with the owners as to the right of way for a ditch properly located, to condemn such right of way across the premises of such owners, as there is no basis in the evidence for such finding; to which holding, judgment and ruling the plaintiffs in error excepted.

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28. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the finding of the district court to the effect that the petition of said so-called Drainage District No. 2 in the county court of Dakota county for the appointment of appraisers to assess the damages to be sustained by the plaintiffs in error by the taking of their said land by said defendants, or said so-called Drainage District No. 2, complied with the requirements of the statute of the state of Nebraska, and that the said defendants had the right to secure any right of way over the plaintiffs' said land by the institution of condemnation proceedings, notwithstanding the plaintiffs in error were omitted from said proceeding and not notified thereof; to which holding, judgment and ruling the plaintiffs in error excepted.

29. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the thirteenth finding of the district court to the effect that when the sums estimated by the appraisers were deposited with the county judge of Dakota county said defendants would be entitled to enter upon the lands of the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, and seize and take the same and dig and construct thereon a drainage ditch, or canal; to which holding, judgment and ruling the plaintiffs in error excepted.

30. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that it was not the purpose of the defendants in what they threatened to do, as alleged in the sixteenth paragraph of the plaintiffs' petition, to use the said real estate of the plaintiffs in error for private, pecuniary purposes and for their own individual benefit, in violation of the Constitution of the United States of America; to which holding, judgment and ruling the plaintiffs in error excepted.

31. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the judgment of the district court to the effect that the plaintiffs in error could not in this case attack or bring into question the corporate existence of said so-called Drainage District No. 2; to which holding, judgment and ruling the plaintiffs in error excepted.

281

32. The supreme court of Nebraska erred in holding, adjudging and ruling and in sustaining the judgment of the district court to the effect that there were a sufficient number of petitioners for the organization of said so-called Drainage District No. 2 to confer jurisdiction on the district court of Dakota county to warrant it to enter an order or judgment, establishing the existence of said so-called Drainage District No. 2 as a public corporation and body politic; to which holding, judgment and ruling the plaintiffs in error excepted.

33. The supreme court of Nebraska erred in holding, adjudging and ruling, and in sustaining the judgment of the district court to the effect that there was sufficient evidence in the case to warrant or authorize the entry of the judgment dismissing the plaintiffs' cause of action and awarding costs against the plaintiffs in error; to which holding, judgment and ruling the plaintiffs in error excepted.

Wherefore, the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, pray that the judgment of the supreme court of Nebraska, and the judgment of the district court of Dakota County, Nebraska, may be reversed.

WILLIAM V. ALLEN,
*Attorney for said Plaintiffs in Error.*

282 [Endorsed:] 17695. In the Supreme Court of the United States of America. Henry W. O'Neill, et al., Plaintiffs in Error, vs. Jacob F. Leamer et al., Defendants in Error. Assignment of errors and prayer for reversal of judgment. William V. Allen, Madison, Madison county, Nebraska, Attorney for Plaintiffs in Error. Supreme Court of Nebraska. Filed Oct. 25, 1913. H. C. Lindsay, Clerk. Allen & Dowling, Lawyers, Madison, Nebraska.

283 And on the same day there was filed in the office of the clerk of said supreme court a certain petition for allowance of writ of error, which original petition, together with its allowance, is as follows:

284 In the Supreme Court of the State of Nebraska.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZBETH LEAHY, Plaintiffs,

v.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellants.

*Petition for Allowance of Writ of Error.*

To the Supreme Court of the State of Nebraska:

Henry W. O'Neill and Cornelius K. Heffernan, the plaintiffs and appellants in the above entitled case, respectfully represent to the court that they are aggrieved by the final rulings, orders, judgments and decrees entered by this court in this case on the 17th day of May, A. D. 1913, and on the 26th day of September, A. D. 1913,

and on divers other dates in favor of the defendants Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, and that they are desirous of suing out a writ of error from said final rulings, orders, judgments and decrees of this court in this case to the supreme court of the United States of America, and to have said final rulings, orders, judgments and decrees of this court reviewed and revised by said supreme court of the United States of America.

Wherefore, these plaintiffs and appellants, the said Henry W. O'Neill and Cornelius K. Heffernan, here pray that a writ of error be allowed herein and that said writ of error and a citation issue for said defendants and appellees and be served on them, and that the clerk of this court be ordered and directed to certify the transcript, records and papers in said cause to the supreme court
285 of the United States of America in accordance with the statutes and rules of practice in such cases made and provided.

WILLIAM V. ALLEN,
*Attorney for said Plaintiffs and Appellants,*
*Madison, Nebraska.*

I hereby certify that the writ of error taken in this case is taken in good faith.

WILLIAM V. ALLEN,
*Attorney for Henry W. O'Neill and*
*Cornelius K. Heffernan, Plaintiffs and Appellants.*

At Chambers of the Supreme Court of Nebraska, Lincoln, Nebraska, October 25th, 1913.

On reading and filing the above and foregoing petition of the plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, for an order allowing a writ of error in this case to the supreme court of the United States of America, said writ of error prayed for by said plaintiffs and appellants is hereby granted and allowed on this date.

By the court.

M. B. REESE,
*Chief Justice of the Supreme Court*
*of the State of Nebraska.*

286 [Endorsed:] 17695. In the Supreme Court of the United States of America. Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer, et al., Defendants and Appellees. Petition for Allowance of Writ of Error. Supreme Court of Nebraska. Filed Oct. 25, 1913. H. L. Lindsay, Clerk. Allen & Dowling, lawyers, Madison, Nebraska.

287 And on the same day there was filed in the office of the clerk of said supreme court, a certain supersedeas bond in the sum of $2,000.00, a copy of which bond, with its approval, is as follows:

Know all men by these presents:

That we, Henry W. O'Neill and Cornelius K. Heffernan of Dakota County, Nebraska, as principals, and Michael F. Heffernan and Patrick Heenan, of Dakota county, Nebraska, as sureties, are held and firmly bound unto Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell of Dakota county, Nebraska, in the full and just sum of Two thousand ($2,000) Dollars to be paid unto the said Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, their certain attorneys, executors, administrators, or assigns to which payment well and truly to be made, we bind ourselves our heirs, executors, administrators or assigns, jointly and severally by these presents. Sealed with our seals and dated this 22nd day of October, in the year of our Lord one thousand nine hundred thirteen.

Whereas, lately at a term of the supreme court of the state of Nebraska in a suit pending in said court between the said Henry W. O'Neill, Cornelius K. Heffernan and Elizabeth Leahy, as plaintiffs and Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, defendants, and the said Henry W. O'Neill and Cornelius K. Heffernan having obtained a writ of error from the supreme court of the United States of America directed to the said supreme court of the state of Nebraska, in said case and
288 filed a copy thereof in the clerk's office of said court to review the judgment in the aforesaid suit and a citation directed to said Jacob F. Leamer, John T. Daley, Fred Bartels, Grenn Armour and Charles H. Maxwell, citing and admonishing them and each of them to be and appear at a session of the United States supreme court to be held at the City of Washington on the 24th day of November in the year of our Lord One thousand nine hundred thirteen, having been cited and served.

Now therefore, the condition of the above obligation is such that if the said Henry W. O'Neill and Cornelius K. Heffernan, shall prosecute said writ of error to effect and answer all damage and costs if they fail to make said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

HENRY W. O'NEILL.
CORNELIUS K. HEFFERNAN.
MICHAEL F. HEFFERNAN.
PATRICK HEENAN.

Sealed and delivered in the presence of:

M. D. TYLER.
D. C. HEFFERNAN.

Approved by:

M. B. REESE,
*Chief Justice of the*
*Supreme Court of Nebraska.*

I hereby certify that each of the principals and sureties on the foregoing supersedeas bond is worth fully the sum of $4,000 in

available property in this county, over and above all debts, exemptions and liabilities.

Dated this 22nd day of October, A. D. 1913.

[SEAL.] D. C. HEFFERNAN,
*County Judge of Dakota County, Nebraska.*

Endorsed: 17695—In the Supreme Court of the United States of America.—Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer, et al., Defendants and Appellees.—Supersedeas Bond—Supreme Court of Nebraska—Filed—Oct. 25, 1913—H. C. Lindsay, Clerk.—Allen & Dowling, Lawyers—Madison, Nebraska.

289 And on the same day there was filed in the office of the clerk of said supreme court a certain Bond for Cists in the sum of $200.00, a copy of which bond, with its approval, is as follows:

In the Supreme Court of the United States of America.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZBETH LEAHY, Plaintiffs,

v.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

*Bond for Costs.*

Know all men by these presents:

That we, Henry W. O'Neill and Cornelius K. Heffernan of Dakota county, Nebraska, principals, and Michael F. Heffernan and Patrick Heenan of Dakota county, Nebraska, as sureties, are held and firmly bound unto Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell in the sum of Two hundred ($200) Dollars to be paid to said obligees their successors, representatives or assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 22nd day of October, A. D. 1913.

Whereas, the above named Henry W. O'Neill and Cornelius K. Heffernan have prosecuted a writ of error in the supreme court of the United States to review the judgment rendered in the
290 above entitled suit by the supreme court of the state of Nebraska:

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their

plea, then this obligation shall be void, otherwise to remain in full force and effect.

HENRY W. O'NEILL, *Principal.*
CORNELIUS K. HEFFERNAN,
*Principal.*
MICHAEL F. HEFFERNAN,
PATRICK HEENAN,
*Sureties.*

Executed in presence of:
M. D. TYLER.
D. C. HEFFERNAN.

The above bond and sureties thereon are hereby approved by me this 25th day of October, A. D. 1913.

M. B. REESE,
*Chief Justice of the Supreme Court of the State of Nebraska.*

I hereby certify that each of the principals and sureties on the foregoing bond for costs is worth fully the sum of $4,000 in available property in this county, over and above all debts, examptions and liabilities.

Dated this 22nd day of October, A. D. 1913.

[SEAL.] D. C. HEFFERNAN,
*County Judge, Dakota County, Nebraska.*

Endorsed: 17695—In the Supreme Court of the United States of America.—Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer, et al., Defendants and Appellees.—Bond for Costs—Supreme Court of Nebraska—Filed—Oct. 25, 1913—H. C. Lindsay—Clerk.—Allen & Dowling, Lawyers—Madison, Nebraska.

291 And on the same day there was filed in the office of the clerk of said supreme court a certain writ of error, which original writ, together with the allowance thereof, is as follows:

292 In the Supreme Court of the United States of America.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZABETH LEAHY, Plaintiffs,

v.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of

the state of Nebraska, before you, or some of you, being the highest court of law or equity in said state in which a decision could be had in the suit between Henry W. O'Neill, Cornelius K. Heffernan and Elizabeth Leahy as plaintiffs and Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, as defendants wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the constitution of the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said constitution, a manifest error hath happened to the great damage of the said Henry W. O'Neill and Cornelius K. Heffernan as by their complaint appears, we being willing that error, if any
293 hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington in the District of Columbia, on the 24th day of November, A. D. 1913, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of The United States on the 25th day of October, in the year of our Lord One thousand nine hundred thirteen.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,
*Clerk of the United States District Court,*
*District of Nebraska,*
By J. H. McCLAY, *Deputy.*

Allowed by:

M. B. REESE,
*Chief Justice of the*
*Supreme Court of the State of Nebraska.*

294 [Endorsed:] 17695. In the Supreme Court of the United States of America. Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer et al., Defendants and Appellees. Writ of Error. Supreme Court of Nebraska. Filed Oct. 25, 1913. H. C. Lindsay, Clerk. Allen & Dowling, Lawyers, Madison, Nebraska.

295 SUPREME COURT,
*State of Nebraska, ss:*

I, H. C. Lindsay, clerk of said court, do hereby certify that there was lodged with me as such clerk, on October 25, 1913, in the case of Henry W. O'Neill et al. vs. Jacob F. Leamer, et al., No. 17695:

1. The original supersedeas bond for $2,000.00 as herein set forth.

2. The original bond for costs in the sum of $200.00 as herein set forth.

3. Six copies of the Writ of Error, as herein set forth—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this second day of December, 1913.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
*Clerk Supreme Court of Nebraska,*
By VICTOR SEYMOUR, *Deputy.*

296 And on the same day, to-wit, October 25, 1913, there was issued in said cause a Citation, which Citation showing service thereof acknowledged, was returned and filed in the office of the clerk of said supreme court on November 1, 1913, and which original Citation and return is as follows:

297 In the Supreme Court of the United States of America.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZABETH LEAHY, Plaintiffs,
v.
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

*Citation.*

UNITED STATES OF AMERICA, *ss:*

To Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour, and Chares H. Maxwell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America in Washington, in the District of Columbia, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska in this case, wherein Henry W. O'Neill and Cornelius K. Heffernan are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of Nebraska, this 25th day of October, in the year of our Lord one thousand nine hundred thirteen.

M. B. REESE,
*Chief Justice of the Supreme Court of the State of Nebraska.*

Attest:

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
*Clerk of said Court.*

298 Due service of the within and foregoing citation is hereby acknowledged this 29th day of October, A. D. 1913, at Dakota City, Nebraska.

R. E. EVANS,
*Attorneys for Defendants in Error.*

299 [Endorsed:] 17695. In the Supreme Court of the United States of America. Henry W. O'Neill et al., Plaintiffs and Appellants, v. Jacob F. Leamer et al., Defendants and Appellees. Citation. Supreme Court of Nebraska. Filed Nov. 1, 1913. H. C. Lindsay, Clerk. William V. Allen, Attorney for Plaintiffs in Error, Madison, Nebraska. Allen & Dowling, Lawyers, Madison, Nebraska.

300 And afterwards, to-wit, on the 7th day of November, 1913, there was rendered by the Chief Justice of said supreme court, and entered of record on the journal thereof, a certain order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1913.

Nov. 7.

No. 17695.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZABETH LEAHY, Plaintiffs,

v.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

Appeal from the District Court of Dakota County.

It being necessary and proper in the opinion of the supreme court of Nebraska and in the opinion of the Chief Justice thereof, that the original papers in this case should be inspected in the supreme court of the United States upon writ of error, it is ordered that the clerk of this court transmit the original transcript and bill of exceptions in this case with all the exhibits to the clerk of the supreme court of the United States at Washington, D. C., for safe keeping and for the consideration of that court in this case, said original

transcript, bill of exceptions and exhibits to be returned to the clerk of this court when said case is finally determined in the supreme court of the United States.

M. B. REESE,
*Chief Justice.*

301 And afterwards, to-wit, on the 11th day of November, 1913, there was filed in the office of the clerk of said supreme court, a certain stipulation in the words and figures following, to-wit:

In the Supreme Court of the United States of America.

HENRY W. O'NEILL, CORNELIUS K. HEFFERNAN, Appellants, and ELIZABETH LEAHY, Plaintiffs,
vs.
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants and Appellees.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto that under rule eight of this court, the transcript to be transmitted to the supreme court of the United States by the clerk of the supreme court of the state of Nebraska in this case, shall embrace the substance of the rough draft thereof accompanying this stipulation and filed with the clerk with the corrections to be made therein as indicated in said rough draft, said clerk, however, in making said transcript to follow the usual and established form; that the original transcript and bill of exceptions shall likewise be transmitted under paragraph four of said rule eight and said transcript shall also embrace the final orders of the supreme court of the state of
302 Nebraska affirming the judgment of the district court of Dakota county herein, and in overruling the motion and application of the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, for a rehearing of this case in that court, also the petition for the allowance of the writ of error, the assignments of error, the costs and supersedeas bonds, the citation and the service thereof and a copy of the opinion of the supreme court of Nebraska in this case, and such other papers and orders as are required by the rules of this court to be made a part thereof and transmitted; including this stipulation, said clerk in making said transcript having due regard to follow the original files.

WILLIAM V. ALLEN,
*Attorney for Plaintiffs in Error.*
R. E. EVANS,
*Attorney for Defendants in Error.*

Endorsed: 17695.—In the Supreme Court of the United States of America.—Henry W. O'Neill et al., Plaintiffs in Error, vs. Jacob

F. Leamer et al., Defendants in Error.—Stipulation.—Supreme Court of Nebraska.—Filed Nov. 11, 1913.—H. C. Lindsay, Clerk. Allen & Dowling, Lawyers, Madison, Nebraska.

303 And on the same day there was filed in the office of the clerk of said supreme court a certain further stipulation in the words and figures following, to-wit:

In the Supreme Court of the United States of America.

HENRY W. O'NEILL and CORNELIUS K. HEFFERNAN, Plaintiffs in Error,
vs.
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants in Error.

*Stipulation.*

It is further agreed and stipulated by and between the parties hereto that the clerk of the supreme court of Nebraska shall include in the transcript to be sent to the supreme court of the United States in this case on the return of the writ of error heretofore issued and served, the assignments of error of the plaintiffs in error made in the supreme court of the state as found in their two briefs as follows:

1. "The district court erred in denying the plaintiffs and appellants Henry W. O'Neill and Cornelius K. Heffernan, the relief prayed in their petition and in dissolving the injunction and dismissing the plaintiffs' suit.

2. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the order of the district court adjudicating that so-called drainage district No. 2 was a public corporation clothed with authority to exercise the right of eminent
304 domain and to condemn and take their lands through which to dig a drainage canal.

3. The plaintiffs and appellants Henry W. O'Neill and Cornelius K. Heffernan assign as error the judgment of the district court in holding drainage district No. 2 to be a corporation, as in violation of section 1 of the 14th Amendment of the constitution of the United States.

4. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the ruling and judgment of the district court in holding that notwithstanding the property attempted to be taken for drainage ditch purposes was not specifically described or definitely located, it was sufficient.

5. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment of the district court in holding that there was a lawful attempt by so-called drainage district No. 2 to agree with the plaintiffs as to the acquisition of a right of way over their lands before condemnation proceedings were had.

6. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment and ruling of the district court to the effect that the county court had jurisdiction to appoint appraisers to locate, condemn and take a right of way for drainage district No. 2 over and across their lands on the petition of said district before the board of supervisors thereof had made an ineffectual attempt to come to an accommodation or to reach an agreement with them respecting the same.

7. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment and ruling of
305 the district court holding that the condemnation proceedings were not rendered void by a failure to take and condemn a right of way across the land of Mrs. Leahy and to take and condemn the land of Henry W. O'Neill north of the lake, which will be flooded by the waters of the ditch.

8. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment and holdings of the district court that so-called drainage district No. 2 had a right to condemn and take the land of a private citizen for the purpose of constructing a dreinage ditch outside of the proposed district and take water before it reached the swamp or submerged lands within the district and carry it across the private property of a private citizen, and empty it into a private lake.

9. Our attack on the corporate existence of drainage district No. 2 so-called, and its proceedings, is direct and not collateral.

10. Drainage district No. 2 so-called is not and never was a corporation under the laws of Nebraska, and is not and never was clothed with authority to exercise the right of eminent domain.

11. The district court of Dakota county had no jurisdiction to create a corporation.

12. The plaintiffs and appellants Henry W. O'Neill and Cornelius K. Heffernan, assign as error the ruling of the district court in holding that the right of way of the drainage district or canal was sufficiently described and definitely located on their lands.

13. There was no attempt by drainage district No. 2 so-called, to agree with the plaintiffs as to the acquisition of the right of
306 way over their lands before condemnation proceedings were had.

14. The alleged condemnation of the plaintiffs' lands was not sufficient to authorize the defendants to dig a drainage canal thereon.

15. The plaintiffs and appellants Henry W. O'Neill and Cornelius K. Heffernan, assign other errors in the rulings of the district court which are fatal to the defense.

WILLIAM V. ALLEN,
*Attorney for Plaintiffs in Error.*
R. E. EVANS,
*Attorney for Defendants in Error.*

Endorsed: 17695. In the Supreme Court of the United States of America. Henry W. O'Neill, et al., Plaintiffs in Error, vs. Jacob F. Leamer, et al., Defendants in Error. Further Stipulation. Supreme Court of Nebraska. Filed Nov. 11, 1913. H. C. Lindsay, Clerk.

307 And afterwards, to-wit, on the 17th day of November, 1913, there was rendered by said supreme court and entered of record upon the journal thereof, a certain order extending time to Dec. 24, 1913, within which to transmit record to supreme court of the United States, which order is in the words and figures following, to-wit:

308 In the Supreme Court of the United States of America.

HENRY W. O'NEILL and CORNELIUS K. HEFFERNAN, Plaintiffs in Error,

vs.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR, and CHARLES H. MAXWELL, Defendants in Error.

*Order.*

It being made to appear to me that H. C. Lindsay, clerk of the supreme court of Nebraska, will be unable to prepare and transmit to the clerk of the supreme court of the United States, his return to the writ of error heretofore issued and served in this case and the record in the case, within thirty days from the issuance and service of said writ of error owing to a pressure of other business and the length of time it would require him to prepare said return and record, it is, therefore, for good cause shown, ordered by me that the time for the return to said writ of error and the transmission of the record herein be enlarged and extended for the full period of sixty days from the issuance and service of said writ of error, to-wit: until the 24th day of December, 1913.

Dated November 17, 1913.

By the Court:

M. B. REESE,
*Chief Justice Supreme Court of Nebraska.*

Endorsed: 17695. In the Supreme Court of the United States of America. Henry W. O'Neill, et al. Plaintiffs in Error, vs. Jacob F. Leamer, et al., Defendants in Error. Order extending time to Dec. 24, 1913, within which to transmit record to Supreme Court of the United States. Supreme Court of Nebraska. Filed Nov. 17, 1913. H. C. Lindsay, Clerk.

309 UNITED STATES OF AMERICA,
*Supreme Court of Nebraska, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United Staes, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subecribe my name, and affix the



OR COPY

seal of said Supreme Court of Nebraska, in the City of Lincoln, this second day of December, 1913.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
*Clerk Supreme Court of Nebraska,*
By VICTOR SEYMOUR,
*Deputy.*

Costs of transcript, including prepaid express $125.00, paid by Wm. V. Allen, Attorney for Plaintiffs.

Endorsed on cover: File No. 23,955. Nebraska Supreme Court. Term No. 804. Henry W. O'Neill and Cornelius K. Heffernan, plaintiffs in error, vs. Jacob F. Leamer, John T. Daley, Fred Bartels, et al. Filed December 5th, 1913. File No. 23,955.

Ex. 45.—J. B. R.

In the County Court of Dakota County, State of Nebraska.

STATE OF NEBRASKA,
*County of Dakota, ss:*

In the Matter of the Appropriation and Condemnation of Lands and Lots in Dakota County, Nebraska, by Drainage District No. 2 of Dakota County, Nebraska, and the Assessment of Damages therefor.

*Notice to Property Owners.*

To Mary Agnes Swift, Central Trust Company of New York, Trustee, Pacific Townsite Company, Wm. H. Coburn, Union Central Life Insurance Company, Joseph Cullen, John Cullen, Christ E. Severson, Ed. T. Kearney, Michael Heffernan, Thomas Sullivan, Chicago, St. Paul, Minneapolis & Omaha Railway Company, Dennis Hogan, James M. Kennelly, James Flynn, Margaret E. Kennelly, Margaret A. McCormick, Cornelius K. Heffernan, James M. Barry, Daniel O'Hanlon, Maggie O'Hanlon, Henry O'Neill, John P. Beacom, Elizabeth Leahy, James E. Beacom, Nellie Maloney, Ellen Maloney, Mildred Maloney, Mary Maloney, James Maloney, Michael J. Maloney, and the heirs of Mary Sullivan, deceased:

You and each of you are hereby notified that Drainage District No. 2 of Dakota County, Nebraska, a corporation of the State of Nebraska, has surveyed and located ditches over and across the several pieces and tracts of real estate hereinafter described, and desires to appropriate, take and hold, for the construction, maintenance and operation of said ditches and for excavation, embankments and *palces* for the deposit of waste earth, and all purposes incidental to said Drainage Improvement a strip of land across said several tracts respectively for the width hereinafter described, in pursuance of the provisions of Section 5563 to Section 5597 inclusive and Sections 10517 to 10533 Cobbey's Annotated Statutes (Edition 1909), and the said several tracts of land, the names of the owners and claimants of title and interest thereto, and the amount of land appropriated, with the description of said several tracts, are attached to this notice and made a part thereof.

And you are further notified, that upon the application of said Drainage District No. 2 filed in the office of the County Judge of Dakota County, Nebraska, appraisers have been appointed by said Judge in pursuance of the statute in such cases made and provided to appraise the damages occasioned by the appropriation of said lands and the location and construction of said Drainage Improvement over the same, and that the said appraisers will meet at the office of the County Judge in Dakota County, Nebraska, on the 9th day of August A. D. 1910, at 10 o'clock A. M. and then proceed to

inspect and view the said real estate, and hear all parties interested in the same, at which time you and each of you will appear before said appraisers as by law provided.

DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, NEBRASKA,
By R. E. EVANS, *Its Attorney.*

A right of way 175 feet in width being 87½ feet on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across that portion of the northeast quarter of the southwest quarter of the northwest quarter of section thirty-five (35) township twenty-nine (29) range seven (7) lying south and east of Elk Creek and over and across that portion of the north half of the southeast quarter of the north west quarter of said section thirty-five (35), lying north — and right of way of the Chicago, Burlington, and Quincy Railroad and south of said Elk Creek, being 6.8 acres. Joseph Cullen and John Cullen being owners.

A right of way 175 feet in width being 87½ feet on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across that portion of the north half of the southeast quarter of the northwest quarter of section thirty-five (35), township twenty-nine (29), range seven (7) lying north of Elk Creek, being .3 acres. Chris E. Severson being owner Ed. T. Kearney mortgagee.

A right of way 175 feet in width being 87½ feet of each side of the center line of said Elk Creek Cut Off Ditch as now located over and across that portion of section thirty-five (35), township twenty-nine (29), range seven (7) known as Out Lot 16, being 3.31 acres. Cris E. Severson owner Ed. T. Kearney, mortgagee.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across that portion of section thirty-five (35), township twenty-nine (29), range seven (7) known as Out Lot seventeen (17), being 2 acres, Michael Heffernan owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as located over and across that portion of section thirty-five (35), township twenty-nine (29), range seven (7), known as Out Lot eighteen (18), being 5.20 acres, heirs of Mary Sullivan, deceased, Thomas Sullivan and —— Sullivan being owners.

A right of way 200 feet in width being 100 feet of each side of the center line of said Elk Creek Cut Off Ditch as now located over and across the right of way of the Chicago, St. Paul, Minneapolis and Omaha Railway, Chicago, St. Paul, Minneapolis and Omaha Railway Company of New York Trustee.

A right of way 200 feet in width being 100 feet of each side of the center line of said Elk Creek Cut Off ditch as now located over and across the unplatted portion of the southwest quarter of section thirty-six (36), township twenty-nine (29) range seven (7) lying south of Block 4 in the village of Jackson *of* north of the right of way *of the way* of the Chicago, St. Paul, Minneapolis and Omaha Railway through said section being .98 acres, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Oc ditch as now located over and across Out Lot A in Jackson, Nebraska, Pacific Townsite Company, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 12, Block 4 Jackson, (formerly Franklin) Nebraska, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of Elk Creek Cut Off ditch as now located over and across Lot 11, Block 4, Jackson (formerly Franklin) Nebraska, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of and across Lot 10, Block 4 Jackson, (formerly Franklin) Nebraska, the center line of said Elk Creek Cut Off ditch as now located over Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 9, Block 4, Jackson, (formerly Franklin), Nebraska, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 8 Block 4, Jackson, (formerly Franklin), Nebraska, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 7 Block 4, Jackson, (formerly Franklin), Nebraska, Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 22, Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin) Pacific Townsite Company owner, occupant and claimant, James M. Kennelly.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 21, Block 3, in Pacific Townsite Company's First Addition to Jackson (formerly Franklin) James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 20, Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 19 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 18 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and

across Lot 17 Block 5 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located aver and across Lot 16 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner,

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 15, Block 3 in Pacific Townsite Company's First —

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 14 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 13 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the centen line of the said Elk Creek Cut Off ditch as now located over and across Lot 12 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James M. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 29, Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James Flynn, owner.

A right of way 200 feet in width being 100 feet on each side of center line of said Elk Creek Cut Off ditch as now located over and across Lot 30 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), James Flynn owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 31 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 32, Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 33 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Cut Off ditch as now located over and across Lot 3 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 4 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over

and across Lot 5 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 6 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin) Dennis Hogan, Owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 7 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 8 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 9 Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 10 Block 3 in Pacific Townsite Company's First Attention to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 11, Block 3 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Dennis Hogan, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 1 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Wm. H. Coburn, Margaret E. Kennelly, occupant and claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 2 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Wm. H. Coburn, owner, Margaret E. Kennelly, occupant and claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 3 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Wm. H. Coburn, owner, Margaret E. Kennelly, occupant and claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 4 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 5 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of

the center line of said Elk Creek Cut Off ditch as now located over and across Lot 6, Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 7 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 8 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Pacific Townsite Company, owners, Margaret E. Kennelly, claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 9 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the Center line of said Elk Creek Cut Off ditch as now located over and across Lot 10, Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 11 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in wodth being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 12, Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Pacific Townsite Company owner, Margaret E. Kennelly, occupant and claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 13 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 14 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Pacific Townsite Company, owner, Margaret E. Kennelly, occupant and claimant.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 15 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 16 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of

the center line of said Elk Creek Cut Off ditch as now located over and across Lot 19 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 20 Block 4 in Pacific Townsite Company's First addition to Jackson (formerly Franklin), Margaret E. Kennellly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 21 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 22 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 23 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 24 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 25 Block 4 in Pacific Townsite Company's First Addition to Jackson (formerly Franklin), Margaret E. Kennelly, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across John Street, Ryan Street, *Ryan Street*, Thomas Street, and Hope Street and the alleys in Block 3 and 4 in Pacific Townsite Company's First Addition to Jackson. The village of Jackson a municipal corporation under the laws of the state of Nebraska is owner and its Board of Trustees is composed of the following persons, to wit:—J. Leahey, Chairman, James M. Barry, Joseph M. Brannan, William Riley, Benj. F. Sawyer, trustee —— Hicky, Cherk.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off Ditch as now located over and across the southeast quarter of the northwest quarter of section thirty-six (36), Township twenty-nine (29), range seven (7) east, being 4.4 acres Margaret Margaret A. McCormick, owner, Ed. T. Kearney, Mortgagee. The Union Central Life Insurance Company, Mortgagee.

A right of way 200 feet in width being 100 feet on each side of

the center line of said Elk Creek Cut Off ditch as now located over and across the northeast quarter of the northwest quarter of section thirty-six (36), township twenty-nine (29), range seven (7) east, being 2.3 acres, and Cornelius K. Heffernan, owner, Mary Heffernan, Mortgagee. (This writ was prior to a W. D. from Mary Heffernan to Cornelius Heffernan but is not released.)

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the northwest quarter of the northeast quarter of section thirty-six (36), township twenty-nine (29), range seven (7) east, being 6.94 acres, Cornelius K. Heffernan, owner, Mary Heffernan, Mortgage. (This writ is prior to a W. D. from Mary Haffernan to Cornelius K. Heffernan but is not released.)

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the northeast quarter of the northeast quarter of section thirty-six (36), township twenty-nine (29), range seven (7) east, being 3.5 acres, James M. Barry, Daniel O'Hanlon and Maggie O'Hanlon, being owners.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 4 or the southeast quarter of the southeast quarter of section twenty-nine (29), township twenty-nine (29) range eight (8), being 5.8 acres, Henry W. O'Neill, owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the southwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range eight (8) being 3.63 acres and Henry W. O'Neill being owner.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across Lot 5 or the northwest quarter of the southwest quarter of section twenty-eight (28), township twenty-nine (29), range eight (8), being .67 acres Henry W. O'Neill and Mary Agnes Swift formerly Mary Agnes Conway, owners.

A right of way 200 feet in width being 100 feet on each side of the center line of said Elk Creek Cut Off ditch as now located over and across the southeast quarter of the southeast quarter of section *of* twenty-five (25) township twenty-nine (29), range (7), being 3.5 acres and Elizabeth L. Leahey being the owner, Ed. T. Kearney, Mortgagee, (This mortgage was given by D. C. Heffernan).

A right of way 100 feet in width being 50 feet on each side of the center line of said Pigeon Creek ditch as now located over the southwest quarter section thirteen (13), township twenty-eight (28), range seven (7), being 3.73 acres, John P. Beacom, owner.

A right of way 100 feet in width being 50 feet on each side of the center line of said Pigeon Creek Ditch as now located over and across the west half of the southeast quarter of section thirteen (13), township twenty-eight (28), range seven (7) east, being 4.4 acres, John P. Beacom and James E. Beacom owners. The Union Central Life Insurance Company, Mortgagee.

A right of way 100 feet in width being 50 feet on each side of the center line of said Pigeon Creek ditch as now located over and across the northwest quarter of the northeast quarter of section twenty (20), township twenty-eight (28), range eight *right* (8), being 3 acres and Ellen Maloney, widow, Mildred Maloney, James Maloney, Mary Maloney and Nellie Maloney widow and minor heirs of Michael J. Maloney, deceased, are owners.

A right of way 100 feet in width being 50 feet on each side of the center line of said Pigeon Creek ditch as now located over and across the southeast quarter of the northwest — of section twenty-one (21), township twenty-eight (28), range eight (8), being 1.4 acres and J. Williams Bridenbaugh being owner and Gustave Berger, Mortgagee.

DAKOTA CITY, NEB'R, *Aug.* 6, 1910.

Received the within writ *of* August 1st, 1910, and on August 3rd, 1910, I served the within writ on the within named, James E. Beacom, John P. Beacom, Joseph Cullen, John Cullen, Chris E. Severson, Ed. T. Kearney, James M. Kennelly, James Flynn, Margaret A. McCormick, Cornelius K. Heffernan, James M. Barry, Daniel O'Hanlon, Maggie O'Hanlon and Henry W. O'Neill by delivering to each of them a true and certified copy of the within writ. On the same day I served the within writ upon Michael J. Heffernan, Dennis Hogan by leaving at the usual place of abode and residence of each of them a true and certified copy of the within writ. On August 5, 1910, I served the within writ upon the within named Ellen Maloney, Mildred Maloney, Mary Maloney, James Maloney and Michael J. Maloney by delivering to Ellen Maloney as their guardian a true and certified copy of the within writ for each of them and by delivering to each of them a true and certified copy of the writ of August 5, 1910. On August 8, 1910, I served the within writ on Elizabeth Leahey, by delivering to her a true and certified copy of the within writ. On August 5th, 1910, I served the within writ upon the Pacific Townsite Company by delivering to John McHugh a true and certified copy of the within writ in the City of Sioux City, Iowa, he, as secretary of the within named Pacific Townsite Company accepting service in the City of Sioux City, Iowa, there being no president, secretary, general manager or other officer of said corporation found in said county.

I J. P. Rockwell sheriff being duly sworn depose and says that I served the -named John McHugh as secretary of the Pacific Townsite Company of Sioux City, Iowa, he accepting service in Sioux City, Iowa.

J. P. ROCKWELL.

Subscribed and sworn to before me and in my presence this 9th day of August, 1910.

GEORGE WILKINS,
*Clerk Dis't Court.*

| | |
|---|---|
| Cost service 20 copies..... | $5.00 |
| Copies ..... | 5.00 |
| Mileage ..... | 2.00 |
| Livery ..... | 1.50 |
| **Total** ..... | $13.50 |

Filed August 9th, 1910.

D. C. HEFFERNAN, *Co. Judge.*

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Number 804.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term 1913.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR,

V.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

## BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM, AND IN SUPPORT OF THE ASSIGNMENT OF ERRORS.

WILLIAM V. ALLEN, Madison, Nebraska,
M. D. TYLER, Norfolk, Nebraska,
*Attorneys for Plaintiffs in Error.*

### STATEMENT.

The statement of counsel for the defendants in error in their "motion to dismiss *and* affirm", and in their brief in support thereof, being unsatisfactory to counsel for the plaintiffs in error, the following is submitted as a fair, although somewhat lengthy, statement of the case.

As the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, were plaintiffs in the district court and appellants in the state supreme court, they will, for convenience, be spoken of as the plaintiffs; and as the defendants in error, Jacob F. Leamer, John T. Daley, Fred Bartels, David Glenn Armour and Charles H. Maxwell, were the defendants in the district court and appellees in the state supreme court, they will, for like convenience, be spoken of as the defendants.

The lengthy quotation of Nebraska statutes in the brief of the defendants in error in support of their motion, from pages 3 to 18, inclusive of 3 and a part of 18, is omitted, as they will be found more succinctly stated and clearly printed in the back part of this brief as Exhibit "A".

The statement of Nebraska statutes on the subject of railroad condemnation proceedings commencing on page 19 of counsel's brief and extending to page 26, inclusive of 19 and a part of 26, is omitted because they will also be found more succinctly stated and clearly printed in the back part of this brief as Exhibit "B".

The statement in counsel's brief, beginning with the words "organization of district" on page 26 and extending to page 35, is omitted as it lacks synthetic connection with the cardinal facts.

The points sought to be made and the authorities cited in the "argument" in the defendants' brief, from page 36 to page 74 inclusive, will be considered in logical order rather than the order in which they are stated by counsel for defendants in error.

Justice in civil cases is administered in Nebraska under a code of procedure, and both actions at law and suits in chancery are known as "civil actions." Section 1, *Code of Civil Procedure, Revised Statutes 1913*, p. 2071. Actions for the recovery of money, and the possession of specific personal property, and for the possession of real estate, are actions at law and triable to a jury. All other "civil actions", or suits

in chancery, are triable to the court. A review of both classes of actions in the supreme court is by appeal, in which the appealing party is known as the appellant and the adverse party as the appellee. All testimony, evidence and exhibits introduced on the trial in the district court are preserved and made a part of the record by a bill of exceptions. In case of an appeal, a certified transcript of the pleadings and other papers required by statute to be filed, as well as the bill of exceptions properly certified, constitute the record. Errors are assigned and argued in printed briefs both in actions and in suits and there is oral argument at the bar.

Chapter 161 of the laws of 1905 (amended by chapter 147 of the laws of 1909), the constitutionality of which is drawn in question will be found in article 4, chapter 19 of the Revised Statutes of 1913, pp. 505-526.

It is noticeable that the act of 1905, (as amended by the act of 1909), is the only statute which delegates, or attempts to delegate to the courts power to create a drainage, or other corporation, by order, judgment or decree. *In this respect it is novel and exceptional in the history of the state.*

All other acts provide for the organization of a drainage district "by county authorities" or "by incorporated companies."

Rev. Stat. 1913, pp. 486, 495.

## THE PETITION.

The petition is embraced in sixteen paragraphs, (Record, pp. 1-7; fols. 2-12), and is summarized as follows:

The first paragraph states that the plaintiff O'Neill owns and occupies the southwest quarter of the southeast quarter of section twenty-nine, the southwest quarter of the southwest quarter of section twenty-eight, and the northwest quarter of

the southwest quarter of section twenty-eight, all in township twenty-nine north, range eight east in Dakota county, which is cultivated and of great value, to-wit: of the value of one hundred ($100) dollars per acre; that the plaintiff Heffernan owns and occupies the northeast quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section thirty-six, township twenty-nine, range seven east of the sixth principal meridian in said county, which is cultivated land and of great value, to-wit: of the value of one hundred fifty ($150) dollars per acre; and that the plaintiff Elizabeth Leahey owns and occupies the southeast quarter of the southeast quarter of section twenty-five, township twenty-nine, range seven east of the sixth principal meridian in said county, which is cultivated land and of great value, to-wit: of the value of one hundred fifty ($150) dollars per acre (Record, pp. 1-2; fol. 1).

* * * * *

The third pargraph states that the lands of the plaintiffs lie sharp to the northeast of Jackson a distance of from one to two miles and are never flooded by the waters of Elk creek or by the flood waters thereof, and are entirely free therefrom, and are distant from the nearest point of Elk creek from one to two miles (Record, p. 2, fol. 4).

The fourth paragraph states that there is a range of hills running from a point north of Jackson to a point far south thereof, and skirting the low lands on the west thereof, known as the west bluffs or bank of the Missouri river bottom, and that all the water from Elk creek, including said flood waters, are thrown upon the low swamp valley, or marsh lands of the Missouri river bottom, the natural course of which, when unobstructed, is along and upon said thirty odd sections mentioned in the petition and somewhat to the east of Jackson

for a distance of many miles, and no part of said waters are ever, in the course of nature, discharged upon or in the direction of said lands of the plaintiffs, or nearer than from one to two miles thereof (Record, pp. 2, 3; fol. 4).

The fifth paragraph reads as follows:

> "That on the 4th day of September, 1909, the said defendants and other residents of Dakota county, Nebraska, filed in the office of the clerk of the district court of said county a paper purporting to be a petition and articles of association under chapter 161 of the laws of the state of Nebraska for the year 1905 for the purpose of securing an order of said court organizing what the defendants have been pleased to name, or call, Drainage District No. 2 of Dakota county, Nebraska. And thereafter on the 23rd day of October, 1909, which was a judicial day of the September, 1909, term of said court, said defendants and said other persons associated with them, secured from said district court an *ex parte* order declaring that said body of lands to the southeast of said village of Jackson, herein described as low, swamp and marsh land, embracing portions of sections thirty-one, thirty-two, thirty-four and thirty-five, in township twenty-nine, ranges seven and eight east of the sixth principal meridian, and portions of sections one, twelve and thirteen in township twenty-eight, range seven east of the sixth principal meridian and portions of sections four, five, six, seven, eight, nine, ten, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-six, twenty-seven and thirty-four, in township twenty-eight, range eight east of the sixth principal meridian in said county, to be and constitute the so-called Drainage District No. 2 of Dakota county, Nebraska, and a public corporation, body politic and corporate under said chapter 161 of the laws of Nebraska for the year 1905; that said so-called Drainage District No. 2 of Dakota county, Nebraska, has no other or different organization or charter than said order and does not exist by virtue of any other authority than said order of said court" (Record, p. 3, fol. 5).

The sixth paragraph avers that no part of the plaintiffs' lands lie within the boundary of said so-called Drainage District No. 2 or adjacent thereto, but that, on the contrary, the

same are from one to two miles therefrom in almost an opposite direction (Record, p. 3, fol. 5).

The seventh paragraph states that the defendants Jacob F. Leamer, John T. Daley, Fred Bartels, Glenn Armour and Charles H. Maxwell, were citizens of Dakota county at the time mentioned in the petition, and claimed to constitute the board of supervisors of said so-called Drainage District No. 2, "which said alleged district they falsely assert and claim was created and made a public corporation and body politic and corporate under the provisions of said chapter 161 of the laws of the state of Nebraska for the year 1905, by the order of said court and in no other way" (Record, p. 3, fol. 5).

Paragraph eight states at some length that the defendants falsely claim that as the board of supervisors of said alleged district, they have a lawful right and authority to enter upon the plaintiffs' land and possess themselves thereof and exclude the plaintiffs therefrom, and to make and construct upon said land a large artificial ditch, or canal, to-wit: a ditch or canal about sixty feet wide at the top, twenty feet at the bottom and thirty feet deep and to throw and leave the dirt excavated therefrom upon the plaintiffs' lands, from a point at or near the mouth of Elk creek, where it has a well defined channel and banks and before it discharges its waters upon said land, and to perpetually carry said water by means of said ditch or canal across the lands of the plaintiffs for a distance of two miles and empty the same into what is known as Jackson lake, a body of water covering about forty acres of land and located upon the land of Henry W. O'Neill, and to permit said water to remain there without any outlet. That the defendants have taken steps to that end and threaten to carry out said purpose unless restrained by the order of the district court, and to that end and that purpose the defendants are advertising the letting of the contract to proposed bidders to enter upon the plaintiffs' said land and to excavate and construct said ditch or canal and damage these plaintiffs and said land. It is further averred that none of the defendants have, or ever had any right or authority to enter upon any of the plaintiffs' land for the

purpose of constructing said proposed ditch, or for any other purpose whatever, "because no proper or legal steps have ever been taken by said defendants or any of them to that end, nor have any condemnation proceedings ever been had to appropriate, take, or condemn any part of said real estate for ditch purposes, or for any other purpose whatever" (Record, pp. 3, 4; fols. 5, 6).

The ninth paragraph avers that the construction of such ditch, or canal over the land of Henry W. O'Neill, "will permanently and for all time injure and damage the same to the full sum of $10,000 and will permanently and for all time damage and injure the said lands of the plaintiff Cornelius K. Heffernan to the full sum of $10,000, * * *" (Record, p. 4; fol. 7).

The tenth paragraph states that it is not within the power or scope of the organization of Drainage District No. 2, so-called, or within the power of the defendants, its alleged officers, to condemn or take a right of way across the lands of the plaintiffs or to construct a ditch or canal thereon, or across the same, or to authorize the same, or to use any portion of said land for said ditch, or canal, or for the purpose of dumping dirt thereon, or to authorize any person or persons to do so, or to construct said ditch or canal, or carry the waters of said Elk creek across the lands of the plaintiffs, or any part thereof, or empty the same into Jackson lake. (Record, pp. 4, 5; fol. 7.)

The eleventh paragraph reads as follows:

> "These plaintiffs aver that no provision has been made or is contemplated by said defendants for the drainage of said Jackson lake of the waters from said Elk creek to be thrown therein by them as herein stated and contemplated, and that said Jackson lake is surrounded by thousands of acres of cultivated land of great value and the taking of the water from said Elk creek through said proposed ditch or canal across the said lands of the plaintiffs and discharging the same into said lake will raise the latter greatly beyond its banks and cause said waters to overflow therefrom and submerge said lands of the plaintiff Henry W. O'Neill and other lands situated in and near said lake, amounting to hundreds of acres,

and will render all said land practically valueless for all time to come" (Record, p. 5; fol. 8).

The twelfth paragraph reads as follows:

"These plaintiffs aver that said defendants claim to have authority by virtue of being what they are pleased to call themselves, the board of supervisors of the alleged Drainage District No. 2 of Dakota county, Nebraska, claimed to have been organized as aforesaid under the act of the legislature of the state of Nebraska aforesaid; that said alleged incorporation or Drainage District No. 2 of Dakota county, Nebraska, has not formulated or filed articles of incorporation under and according to the general statutes of the state of Nebraska on the subject of corporations, and its only alleged charter or authority for existence is contained in said petition and said articles of association filed in the office of the clerk of the district court of Dakota county, Nebraska, as aforesaid, and said order of said district court of said county issued under section three, chapter 161 of the laws of the state of Nebraska for the year 1905, a copy of which is hereto attached and incorporated herein as a part of this petition marked Exhibit 'A' (Record, p. 5; fol. 8).

"(Exhibit 'A'. Section 3. All owners of real estate in said district who have not signed said articles of association and who may object to the organization of said drainage district, after having been duly summoned, shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection, or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefitted by drainage, and should not be embraced in said drainage district, and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case such objections are overruled, the district court shall, by its order entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain one hundred sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully in-

cluded in said district, and will not be benefitted thereby, then the court may exclude such real estate as will not be benefitted, and declare the remainder a district as prayed for.)" (Record, p. 7; fol. 12.)

The thirteenth paragraph reads as follows:

"And the plaintiffs aver that the district court of Dakota county, Nebraska, had no jurisdiction, power or authority to make or issue an order incorporating said alleged Drainage District No. 2 of Dakota county, Nebraska, or to exercise the legislative power necessary to create said alleged Drainage District No. 2 of Dakota county, Nebraska, a body corporate and politic, and that said order of said court issued as aforesaid is null and void and is in direct violation of section 1, article 2 of the constitution of the state of Nebraska which reads as follows: 'The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.' That said section 3, chapter 161 of the laws of the state of Nebraska for the year 1905, is in violation of section 1, article 2 of the constitution of the state of Nebraska, in so far as it attempts to authorize the district court of Dakota county, Nebraska, to create a corporation and body politic as the creation of a corporation and body politic is a legislative and not a judicial function or power, and the attempt of the legislature, by said act, to authorize the judge of the district court of said county to constitute and create a corporation and body politic is not a judicial authority but is a legislative authority to be exercised by the legislative department of the state alone" (Record, pp. 5, 6; fol. 9).

The fourteenth paragraph avers that the natural drainage of all waters from Elk creek onto the low land is to the southeast of the place where they are emptied thereon by said creek and from thence southerly and not upon the lands of the plaintiffs or in the direction thereof, "and that the said defendants are in no manner attempting to ditch or canal said low lands in the direction of the natural drainage of said waters through said lands, or in any other way, but are attempting to take, and intend to take the waters from said Elk creek before they reach said low lands and while they are con-

fined in the channel of said creek and divert them from said low lands and across the said lands of the plaintiffs herein described, and in almost an opposite direction from their natural flowage" (Record, p. 6; fol. 9).

The fifteenth paragraph reads as follows:

> "The plaintiffs aver that the said defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota county, Nebraska, and have no lawful authority or right whatever under the constitution of the state of Nebraska and the constitution of the United States of America to invade the plaintiffs' said land herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof; and that to permit them to do so would be a violation of section 21, article 1 of the constitution of the state of Nebraska, which provides that: 'The property of no person shall be taken or damaged for public use without just compensation therefor,' and of section 1, article 14 of the constitution of the United States of America, which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.'" (Record, p. 6; fol. 10).

The sixteenth paragraph reads as follows:

> "The plaintiffs aver that the single object and purpose of the defendants in what they intend and threaten to do as herein alleged, is wholly private, and in the exclusive pecuniary interest of the so-called corporators of said alleged Drainage District No. 2 of Dakota county, Nebraska, including the defendants, and that said alleged Drainage District No. 2 of Dakota county, Nebraska, has no public character or function whatever and does not pretend to have any authority, other than that which is strictly private, and its alleged incorporation was and is for the exclusive purpose of enabling the defendants, and their associates, to accomplish in their aggregate capacity what the respective individuals thereof could not do; that is, to take the private property of other private citizens, including the plaintiffs herein, for strictly private uses and purposes and for their own individual benefit in

violation of the constitution of the state of Nebraska and of the constitution of the United States of America" (Record, pp. 6, 7; fol. 10).

The prayer is for a temporary injunction to restrain the defendants from entering upon or attempting to enter upon the plaintiffs' premises described in the petition and from constructing or attempting to construct, or from permitting others to construct any ditch or canal over or across the same or over or across any portion of the same, and from throwing upon the lands of the plaintiffs or any part thereof, any dirt or material to be excavated from any such ditch or canal and from taking or diverting the waters of said Elk creek from the channel thereof and conducting or permitting the same to be conducted across the lands of the plaintiffs, or any part thereof, and from emptying the same into Jackson lake, and from permitting or encouraging any other person, or persons, or so-called contractor, or contractors, agent, servants or employees from doing any of said acts, and upon the final hearing of the case said injunction be made perpetual; and that the plaintiffs have such other and further relief in the premises as may be just and agreeable to equity (Record, p. 7; fol. 11).

## THE ANSWER.

The answer, after having admitted most of the allegations of the petition, pleaded at length that the district of which the defendants claim to be officers, was incorporated by the judgment of the district court of Dakota county under the legislative act of 1905, as amended by the act of 1909, and in no other way. It avers that the defendants were the elected and qualified officers of the drainage corporation, and that they had taken steps to condemn, and would condemn and take, the property of the plaintiffs described in the petition for the purpose of a drainage ditch. The defendants do not claim the right to do so in any other capacity or way or by any other authority (Record, pp. 8-14; fols. 14-22).

## PLAINTIFFS' REPLY.

The plaintiffs filed the following reply (Record, pp. 14-16; fols. 23-27):

"1. These plaintiffs deny each and every allegation contained in the defendants' answer which is not an admission of the allegations of the petition filed herein, or of some of them, and specifically deny that Drainage District No. 2 is or ever was a corporation under the laws of this or any other state.

"2. These plaintiffs aver that the act of the legislature of the state of Nebraska for the year 1905, entitled, 'An Act for the organization and government of Drainage Districts, etc.,' consisting of 39 sections, approved March 25, 1905, and comprising part of the laws of the state of Nebraska for the year 1905, and the subsequent act of the legislature of the state of Nebraska for the year 1907, entitled, 'An Act to provide for Drainage Districts to drain wet lands, etc.,' approved March 27, 1907, consisting of thirty-two sections, and comprising a part of the laws of the state of Nebraska for the year 1907, are in direct and specific violation of section 1, article 11b of the constitution of the state of Nebraska entitled, 'Miscellaneous Corporations,' which reads as follows: 'No corporation shall be created by special law, nor its charter extended, changed or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed,' in so far as the same or any part thereof confers or attempts to confer upon the district court of the state of Nebraska, jurisdiction, authority, or power to create or to participate in or to aid in the creation of a corporation; and are in violation of section 1, article 2 of the constitution of the state of Nebraska, which provides: 'The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted,' in so far as the same confer or attempt to confer upon the district courts of the state of Nebraska jurisdiction, authority, or power to organize or

to participate in the organization of a drainage district and in so far as the same confer or attempt to confer jurisdiction, authority or power on the district court of Dakota county, Nebraska, to organize or to participate in the organization of Drainage District No. 2 of said county.

"3. And these plaintiffs further replying to said answer aver that sections 14, 15, 16 and 17 of the act of the legislature of the state of Nebraska, for the year 1905, entitled, 'An Act for the organization and government of Drainage Districts, etc.,' approved March 29, 1905, are unconstitutional and void under the provisions of the constitution of the state of Nebraska set out and copied in paragraph two hereof, and of section 1 of the 14th amendment to the constitution of the United States of America, in so far as section 14 of said act requires the plaintiffs or any of them or any other person to make an application in writing to the board of supervisors of Drainage District No. 2 of Dakota county, Nebraska, for compensation and damages sustained by them or any of them by reason of any proceedings or steps taken or to be taken under said act, and in so far as said act or acts require the said plaintiffs or any of them or any other person to file any objections which they may have to the proposed assessment shown or required to be shown by the notice provided for in section 13 of said first act by the estimate, plats and plans of the engineer as to the amount of the proposed assessment against their respective lands, etc., said section and each of said acts being incorporated herein and made a part of this reply by reference. And section 15 of the said first act is unconstitutional and void under the provisions of the constitution of the state of Nebraska herein set out and of section 1 of the 14th amendment to the constitution of the United States of America, in so far as it confers or attempts to confer authority upon the board of supervisors of Drainage District No. 2 of Dakota county, Nebraska, the power or authority to hear and determine whether the requisite notices have been given as required by said act and if they find that due notice has not been given to continue the hearing on any claim or claims that may be filed before them or that any owner of any property sought to be taken may have contemplated by section 14 of said act, to a date to be fixed by them and to order notices to be served on the plaintiffs or on any of them as provided in said act and when they find that due notice has been given authorizing or conferring upon them power to proceed to hear any objection or objections which may be filed as in

said act provided in all claims for damages and other matters upon which issue has been made, may be made as provided in sections 13 and 14 of said first act, and conferring upon them power to subpoena, swear and examine witnesses and to do all other matters necessary and incidental to a proper hearing of said issues or to exercise any judicial functions whatever, etc., because the same usurps and trenches upon the province of the established judiciary of the state of Nebraska, and is in violation of section 1, article 6 of the constitution of Nebraska, which reads as follows: 'The judicial power of this state shall be vested in the supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by the law for cities and incorporated towns,' in that said Drainage District No. 2 and said board of supervisors are not and can not by statute be made a judicial tribunal and have not and can not under the constitution of the state of Nebraska exercise any judicial authority or power over the rights or property of the plaintiffs or of any of them or of any other person or persons. And the said sections of said acts are in violation of section 1 of the 14th amendment of the constitution of the United States of America which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' as said sections of said acts, as well as said entire acts, abridge the privileges and immunities of the plaintiffs and of each of them, who are and at all times heretofore have been citizens of the United States, and deprive them and each of them of their property without due process of law and deny to them and to each of them the equal protection of the laws.

"4. And these plaintiffs further aver that neither the said defendants nor said Drainage District No. 2 of Dakota county, Nebraska, nor said so-called board of supervisors thereof, ever agreed upon a location or route for said proposed ditch over or across any of said lands mentioned in the petition, nor did said so-called board of supervisors or said Drainage District Number 2 ever agree or attempt to agree with the plaintiffs or any of them, the owners of the property described in the petition, as to the acquisition of the proposed right of way over the same, nor were they or either of them ever unable

to agree with the plaintiffs or with any of them, owners of said property described in the petition as to the acquisition of a right of way over or across said lands or any part thereof, nor were the necessary preliminary steps taken, as specified and pointed out in either of said acts, as a condition precedent to the right to enter upon, condemn or take said property of the plaintiffs or any of them described in the petition.

"Wherefore the plaintiffs urge and renew the prayer contained in their said petition."

The trial of this case in the district court commenced April 24, 1911, and was concluded April 26, 1911, (Record, p. 18; fol. 29), and a final judgment was entered, "that the temporary injunction heretofore allowed and issued be and the same is dissolved and this action dismissed," as to the plaintiffs O'Neill and Heffernan, the plaintiffs reserving exceptions thereto (Record, p. 22; fol. 36).

At the trial, the defendants assumed the burden of proof, because under the law of Nebraska where there is a specific denial of corporate existence, the burden is on the persons assuming to exercise such rights to establish corporate capacity.

*The Welland Canal Co.* v. *Hathaway,* 8 Wend. (N. Y.) 480, 481.

*Jackson* v. *Plumbe,* 8 Johns. (N. Y.) 378.

*The Dutchess Cotton Manufactory* v. *Davis,* 14 Johns. (N. Y.) 238, 244.

*The President, Directors and Company of the Bank of Auburn* v. *Weed and Aiken,* 19 Johns. (N. Y.) 300, 303.

"Whether or not a corporation exists which may sue or be sued, is always open to challenge by a proper plea in an action by or against it as such. *Railway Co.* v. *Fifth Baptist Church,* 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784. And such a plea is not regarded as a collateral attack, but one which challenges the very existence of the corporation and its right to sue or be sued. *Folsom* v. *Star Union Co.,* 54 Iowa 490, 6 N. W. 702; *Fredenburg* v. *Lyon Lake Church,* 37 Mich. 476; *Capps* v. *Hastings Prosp. Co.,* 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; *Abbott* v. *Omaha Smelting Co.,* 4

Neb. 416; *Mokelumne Mining Co.* v. *Woodbury,* 14 Cal. 424, 73 Am. Dec. 658; *Oregon Ry. Co.* v. *Oregon Nav. Co.,* (C. C.) 22 Fed. 245; Id., 23 Fed. 232; *Doboy Tel. Co.* v. *DeMagathias,* (C. C.) 25 Fed. 697."

*Elgin National Watch Company* v. *Loveland,* 132 Fed. Rep. 41, 45.

* * * * *

"Agreements to form one, statements that there was one, signed articles of association to make one, acts as one, created no color of incorporation, because there could be no incorporation or color of it under the law until the articles were filed. *Johnson* v. *Corser,* 34 Minn. 355, 25 N. W. 799; *Finnegan* v. *Noerenberg,* 52 Minn. 239, 243, 244, 53 N. W. 1150, 1151, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Taylor on Private Corporations,* p. 145; *Roberts Mfg. Co.* v. *Schlick,* 62 Minn. 332, 64 N. W. 826."

*Harrill* v. *Davis,* 168 Fed. Rep. 187, 193.

To the same effect see, *Chapman* v. *Brewer,* 43 Neb. 890, 899, 900; *Capps* v. *Hastings Prosp Co.,* 40 Neb. 470, 476, 477, 478.

In compliance with this rule the defendants assumed the burden of proof and introduced Exhibits "1" to "52" inclusive (Record, pp. 24 to 85, inclusive of each). The introduction of these exhibits had no other purpose.

Then follows a statement of the signing of a bill of exceptions by the judge of the district court, July 22, 1912, which extends from page 85 to page 154 inclusive of the record, including folios 135 to 252.

Of the 129 persons said to have owned real estate within the boundaries of the proposed drainage district (Record, p. 25; fols. 41, 42), when the paper "petition and articles of association" was signed, but 57 signed the same (Record, p. 26; fol. 42). Of these, Jacob F. Leamer, I. W. Fisher, Adam O. Sides, Matilda Sides and Henry Ostmeyer withdrew, leaving but 52 petitioners September 4, 1909 (Record, p. 11; fol. 18), when the action to secure a judicial incorporation of the district was commenced, and the summons therein was issued and published (Record, pp. 28, 39; fols. 47, 62), and service thereof was made (Record, pp. 39, 40; fols. 62, 63). Of these 52

petitioners, two names were signed "Thomas E. Heffernan, Adm.," and "John F. Cain by A. F. Cain" (Record, p. 26; fol. 42), no authority being shown therefor.

Thereafter, October 16, 1909, Jacob F. Leamer, I. W. Fisher, Adam O. Sides, Matilda Sides and Henry Ostmeyer, filed papers entitled "re-petition" (Record, pp. 47, 48, 49; fols. 75, 76, 77; Exhibits "12" and "13"), which was barely eight days before the entry of the judicial decree in that case pretending to incorporate the drainage district (Record, p. 51; fol. 80; Exhibit "17"). Deducting the names of these persons because of the withdrawal, and the names of "Thomas E. Heffernan, Adm.," and "John F. Cain by A. F. Cain," because not properly signed, or not signed by competent authority, there were but 50 persons who properly signed the "petition and articles of association," which leaves 79 real estate owners who did not sign. Of this number 49 signed and filed objections (Record, p. 45; fols. 71, 72), thus clearly showing that a majority of the owners of real estate in the district sought to be incorporated by judicial decree, did not petition therefor and should be counted against it.

It is true that October 20, 1909, John F. Heffernan, Alice Heffernan and Joseph W. Heffernan (Record, pp. 34, 35; fol. 55), signed and filed a paper entitled "consent to formation of district"; that September 30, 1909, John Cullen and Joseph Cullen signed a like paper, which was filed October 1, 1909 (Record, pp. 35, 36; fols. 56,57); that October 4, 1909, Sylvester B. Polly and Elizabeth A. Polly signed a like paper, which was filed October 18, 1909 (Record, p. 36; fol. 57), and that October 16, 1909, Alice E. Sides and Jacob A. Sides, signed a similar paper which was filed October 18, 1909 (Record, p. 37; fol. 58). But these papers did not make them parties to the action or confer jurisdiction on the district court to proceed with the case and enter a judicial decree declaring Drainage District No. 2 to be a corporation. The proceeding in the case being purely statutory and given by chapter 161 of the laws of 1905 (amended by chapter 147 of the laws of 1909),

a strict literal compliance was necessary to confer jurisdiction upon the court, even if the act were constitutional.

At the meeting called by the clerk of the district court for the election of "supervisors," there were personally present 60 persons and 24 by proxies, and 35 not present in person or by proxy (Record, p. 63; fols. 99, 100). The total number represented by proxies and those not present in person or by proxy was 59 (Record, p. 63; fol. 100). As guardian *ad litem*, Paul Pizey filed objections for 13 minors. There was therefore a decided majority of the competent owners of real estate in the proposed district, who did not legally sign the "petition and articles of association," or personally participate in the election of "supervisors."

It is admitted that the so-called drainage district "does not include the lands of the plaintiffs in error, Henry W. O'Neill and Cornelius K. Heffernan, or the lands of Elizabeth Leahy" (Record, p. 52; fol. 82).

It is admitted, in the brief of the defendants (p. 28), that: "The plaintiffs did not, and do not, reside within the proposed drainage district and own no property within the district and were not made parties to or served with notice of the action taken to organize the district."

Exhibit "17" is the journal entry or judgment, "In the Matter of the Organization of Drainage District Number Two (2) of Dakota county, Nebraska," and recites, among other things: "That the persons who have made and signed said articles of association are of lawful age and competent, and were at the time of filing said articles of association and now are a majority in interest of the owners of the land described in said articles of association, * * * (Record, p. 51; fol. 81). That all of said land should be embraced in said drainage district and liable to taxation for draining the same; that the drainage thereof will be a public utility and will be conducive to the public convenience, health and welfare, and the expense of such drainage will not be disproportionate to the benefits to

be derived therefrom; * * * that said drainage district of the corporate name mentioned in said articles of association, to-wit: Drainage District Number Two (2) of Dakota county, Nebraska, with power and limitations in said articles of association enumerated, and such others as are now or hereafter may be provided by law, should be duly established and declared a public corporation of the state of Nebraska; * * * and that said body of land be, and the same hereby is, established and declared a public corporation of the state of Nebraska, to be designated and known as Drainage District Number Two (2) of Dakota county, Nebraska, * * *" (Record, pp. 51, 52; fols. 81, 82).

*There is no claim or pretense that the so-called drainage corporation was created, or organized, in any other way.*

By proper appellate proceedings, this case was taken to the supreme court of Nebraska, May 17, 1913, the final judgment was entered therein, reciting, among other things, that: "* * * It is therefore considered and adjudged that said judgment of the district court be and the same is hereby affirmed, * * *" (Record, pp. 154, 155; fols. 252, 253).

The written opinion is in the record from pages 155 to 159, folios 254 to 262.

The plaintiffs filed a motion for rehearing (Record, pp. 159, 160, 161; fols. 263, 264, 265).

September 26, 1913, a final judgment was entered thereon, that:

> "This cause coming on to be heard upon the motion of appellants for a rehearing herein, was submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied" (Record, p. 161; fol. 266).

The case was transferred to this court on writ of error, October 25, 1913 (Record, p. 162; fol. 268), and the assign-

ment of errors and prayer for a reversal are in the record from pages 162 to 170, folios 269 to 281.

The remainder of the record consists of the petition for a writ of error, the order allowing it, the supersedeas bond, the cost bond, the writ of error, the citation, order extending the time for return of the writ of error, stipulation as to assignment of errors in the supreme court of Nebraska, and other matters of procedure (Record, pp. 170-182; fols. 284-309).

The proceeding before the county judge to appoint three appraisers to condemn a right of way across the lands of the plaintiffs, and to assess the damages by reason thereof, was strictly *ex parte*. The application therefor was filed probably about the 22nd of July, 1910 (Record, p. 71; fol. 112). August 19, 1910, an application was made to substitute a lost petition in that proceeding (Record, p. 71; fol. 112), and a substitution for the petition for the appointment of appraisers was filed (Record, pp. 71, 72, 73, 74; fols. 113, 114, 115, 116, 117). The plaintiffs had no notice of these proceedings.

July 22, 1910, the county judge appointed "Michael Beacom, Fred Voss and Chris Hansen, as appraisers to appraise all the damages done to the several tracts of land in said application described, and to the owners thereof, by reason of the taking and appropriating of said several strips and tracts of land for the location, use and construction of said improvement over and across the same, * * *," and fixing August 9, 1910, at 10 o'clock a. m., as the time and place of meeting at his "office and to proceed to examine, view and investigate the said real estate so appropriated for said purpose and hear the parties interested in the same as the law provides" (Record, p. 74; fols. 117, 118).

No notice of the application was given the plaintiffs, nor was an opportunity afforded them to appear before the county judge and object to the individuals to be selected as appraisers, but the proceeding was strictly *ex parte*. The appraisers were appointed by the county judge, and not by the county court (Record, p. 74; fols. 117, 118).

In the brief of counsel for the defendants (p. 63), it is said:

> "The state courts did not hold that 'Lot 5' of the plaintiff Henry W. O'Neill could be perpetually overflowed. The facts are Henry W. O'Neill owns no land north of the lake. He offered no competent proof of title to any such land; 'Lot 5' does not extend north of the Jackson lake. It is one of the tracts of land specifically described in the petition for condemnation; * * *. This award covers all damage incidental to that particular tract."

That this statement is a clear misconception of the record, is made plain by the following facts appearing in the record: As to the ownership of lot 5 the record shows that damage "to *lot five* * * * owned by Henry W. O'Neill, *or* Mary Agnes Swift, was appraised at $100" (Record, p. 20; fol. 33); that a "right of way * * * over and across lot five * * * being .67 acres" was condemned as the property of "Henry W. O'Neill *and* Mary Agnes Swift * * * owners" (Record, pp. 72, 73; fol. 114); that "a right of way over and across lot five * * * being .67 acres" was condemned as the property of "Henry W. O'Neill *and* Mary Agnes Swift * * * owners" (Record, p. 79; fol. 125); that "a right of way * * * *as now located* over and across lot five * * * being .67 acres" was condemned as the property of "Henry W. O'Neill *and* Mary Agnes Swift * * * owners" (Record, p. 84; fol. 133).

The words "as now located over and across lot five" are significant and explain the full extent to which lot five was condemned. That it was condemned only to the west or south bank of the lake, is evident from the language, "where the north line * * * *intersects the south bank of what is known as Jackson lake*" (Record, p. 19; fol. 32). Thus it will be seen that lot five, consisting of forty acres, thirty-five of which lie east or north of Jackson lake, but .67 acres, or 7/10 of an acre in round numbers, was condemned and but $100 was allowed therefor. If $100 was the fair value of 7/10 of an acre, then it is quite evident that the condemnation and dam-

ages awarded by the appraisers extended only to the 7/10 of an acre. Lot five, at the rate of $100 for 7/10 of an acre, would be worth, approximately, $594.

There can not be the slightest doubt that the condemnation of lot five extended only to the south bank of the lake where the waters of the ditch were emptied. This is evident not only from the language quoted from the record, but from the fact that .67 or 7/10 of an acre was condemned and appraised.

Respecting the ownership of lot five, Henry W. O'Neill testified as follows: "My land is right around in here (indicating on plat, Exhibit "48"). It is called lot 3 and 5 of section 28, township 29, range 8. There is 153 acres in it. *Have owned that land 27 years. I have occupied it 27 years*" (Record, pp. 105, 106; fol. 171).

And Mr. Wooley, the civil engineer, testified: "Yes I understand Mr. O'Neill *owned all of lot 5, over north of the lake* a part of lot 5, the north half of lot 5 marked by the line that divides is a part of the southeast quarter of section 28 (the O'Neill land). Yes, sir, 40 acre tract" (Record, p. 93; fol. 148).

This testimony is nowhere contradicted and the fact of Mr. O'Neill's ownership has never been contested until the present time.

Condensed, the following are important facts: Jackson lake covers about 800 acres; it is about 7 miles long, has an average width of from 4 to 5 hundred feet and a depth of from nothing to 4 or 5 feet.

There was no condemnation or appraisement of the 35 acres of lot 5 lying north of Jackson lake.

The proposed ditch has a capacity of 5,000 cubic yards per second, which would be poured into the lake. A rise of 4 feet "would cover all Mr. O'Neill's land" in lot 5 (Record, p. 36; fol. 157).

The south bank of the lake from the top to the waters' edge is about 13 feet.

The original meander line of the government established in 1858 was north and east of Jackson lake.

Jackson lake is private property.

The right of way is to be 100 feet on either side of a center line, or 200 feet in all (Record, p. 84; fol. 133).

The condemnation and appraisement takes 6.93 acres of Mr. Heffernan's land; 5.8 acres of one tract of Mr. O'Neill's land; 3.63 acres of another tract, and .67 acre of lot 5.

The ditch is to be 50 feet wide at the top; 23 feet at the bottom and 15 feet deep, leaving 75 feet on either side for bermes and dump. No provision is made for covering or bridging the ditch or carting away the excavated dirt, nor was any appraisement made of damages to be sustained to the entire tracts of land of the plaintiffs by reason of the digging of the ditch, distinct and apart from the acreage actually to be taken. This was strictly necessary.

*Scace* v. *Wayne County*, 72 Neb. 162.

The drainage of the flood water from the land of the proposed district is to the south, and from a foot to a foot and a half per mile (Record, p. 147; fol. 239).

The record fails to disclose that a judgment was ever entered on the report of the appraisers in behalf of either of the plaintiffs for the damages it was found they would sustain by the appropriation and taking of a right of way over their property (Record, p. 83; fol. 131).

No notice was given the plaintiffs of the application for the appointment of appraisers and they were not present and did not participate therein. No meeting of the appraisers was ever held at which the plaintiffs or any witnesses for them were heard or examined, nor was such an opportunity afforded them (Record, p. 83; fol. 131).

No definite line of location of the proposed ditch was ever made.

Respecting the alleged location of the ditch over the lands of the plaintiffs, Mr. Wooley, a civil engineer, testified (Record, p. 91; fol. 145):

"There are no stakes along from the confluence of Honey creek and Elk creek that I could find. * * * No sir, nothing that I could find to indicate a survey ever made to that Jackson lake. * * * No sir, there are no stakes across that cultivated field, or any evidence of anybody having been across there to survey, or any old ditches or anything of the kind. No sir, nothing that civil engineers call tying. No sir, nothing down at Honey creek to show a tying of the survey. I couldn't go out and locate the ditch. No sir, there is nothing to indicate anybody had been across there or pretended to make a survey there, across the Heffernan property or the Leahy property. No sir, nothing to indicate its location. * * * There is nothing at the lake on Henry W. O'Neill's land to locate the outlet of the ditch. No sir, there is nothing from the intersection of Honey creek with Elk creek to show the survey or location of a ditch. * * * No sir, there is nothing to show how far north of the right of way of the Burlington railway any survey was. * * * (Record, p. 92; fol. 146.) No sir, there is nothing to indicate upon which side of the road this proposed ditch is. Nothing on the ground at all. No sir, not a bit more than there is a mile north of it or a mile south. * * * *A line running in a northeasterly direction to a point in the southwest quarter of section 28, township 29 north, could strike this Cut Off lake (or Jackson Lake) at any point within 3,000 feet and still be in the southwest quarter of section 28.* No sir, there is nothing at the point called the mouth of the ditch near sounding 8 to indicate there has been a survey there or to indicate the location of the ditch. * * * No sir, there is no physical object anywhere along there to indicate a survey. *No sir, a stranger could not go along there and tell there had been a survey there.*"

And Fred C. Smith, another civil engineer, testified:

"The ditch starts at the confluence of (Record, p. 147; fol. 239) Honey creek with Elk creek *with no definite point of starting, it follows the C., B. & Q. R. R. and angles to the north and east without any angle being given or degree of curve and runs in a northeasterly direction somewhere in the section, and it cannot be located by that.* * * * I might by taking the scale locate it

within 200 feet, but not any closer. Yes sir, 200 feet is as near as I can get. Yes sir, a person getting within 200 feet would be very lucky. *They could vary more than 200 feet and still be within the requirements of that plat or description.*"

The undisputed evidence of Henry W. O'Neill, is that:

"A half mile west of Jackson, Elk creek has good banks. No sir, there is no valley south. That is a part of Elk creek valley. Q. They run up the Elk creek? A. Yes sir. Q. To get this water before it gets out on the valley? A. Yes sir. Q. And take it across through this ditch and throw it on your land, that is about it? A. Yes sir (Record, p. 106; fol. 171)."

Elk creek takes its rise in the northwest part of Dakota county and runs southeasterly to a point about a half mile west of Jackson where the waters of Honey creek empty into it. It then continues southeasterly through the proposed drainage district finally emptying into the Missouri river in the southeast part of the county. A ridge of hills debouching from the Missouri river to the north of Jackson, runs near that village and thence northwesterly on the north side of Elk creek and the railroads. There is also a ridge of hills on the south side of Elk creek which continues southward to Nacora, near the southeast corner of the county. All intermediate streams enter Elk creek and the waters thereof flow to the Missouri river.

Commencing a half mile west of Jackson is the proposed drainage district, taking the water from Elk creek and running thence in an easterly direction through a part of Jackson and thence northeasterly across the lands of Cornelius K. Heffernan, Mrs. Leahy and Henry W. O'Neill, in the order named, to the south or west bank of Jackson lake, where it ends, lot five of Mr. O'Neill's land lying north and east of the lake.

The outline of the proposed drainage district is not visible or physical lines but is simply an imaginary line of the survey. Other matters are explained by map notes.

The prominent points and places of interest, are given that the court may have a better understanding of the *locus in quo*.

As the errors assigned (Record, pp. 162-170; fols. 269, 281), consisting of thirty-three paragraphs, are so numerous and repetitious, for convenience, we state the following as our

## SPECIFICATION OF ERRORS.

The supreme court of Nebraska erred:

1. In holding that chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, was not in violation of, but consistent with, that part of the 14th amendment of the constitution of the United States which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and in refusing to rule that said Act was an unconstitutional legislative device, or scheme, to enable the defendants and their associates and others similarly situated, under color of corporate authority, to take the private property of the plaintiffs for their own private use, and thereby enhance the value of the same at the expense of the plaintiffs.

2. In holding that chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, was not in violation of that part of the 14th amendment of the constitution of the United States, which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and in ruling that the legislature of Nebraska could, by said Act, confer on the district court jurisdiction to declare said proposed drainage district to be a public, as distinguished from a private corporation, when it was essentially private, and by that means confer on

the defendants authority to take and damage the private property of the plaintiffs for the private use of the defendants and their associates.

3. In holding that chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, was not in violation of, but consistent with, that part of the 14th amendment of the constitution of the United States which declares that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; because said Act was designed to and does abridge the privileges or immunities of the plaintiffs, and the privileges or immunities of other persons similarly situated.

4. In holding that the legislature of Nebraska could, by the passage of said Act, lawfully delegate authority to the district court to establish a drainage corporation by its order and by that means nullify or evade the 14th amendment of the constitution of the United States which reads, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and thereby give legal force and effect to said Act.

5. In holding that the petitioners for the creation of said alleged drainage corporation, under said Act, could be confined to a majority in interest of the owners of the lands sought to be embraced in the district, regardless of the rights of other owners, persons and corporations, because said Act is in violation of that part of the 14th amendment of the constitution of the United States which declares that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. In holding that by the passage of said Act, the Nebraska legislature could, by violating section 1, article 2 of the state constitution and thus change from the specific type of republican government it had chosen, in violation of section 1, article 4 of the constitution of the United States, providing that: "The United States shall guarantee to every state in the Union a republican form of government," and thereby enable the defendants to refuse, or neglect to enforce the provisions of the state constitution which distributes all legislative power to the state legislature and prohibits the exercise thereof by, or through the judiciary, and by that means evade the force and effect of that part of the 14th amendment of the constitution of the United States quoted, to the injury of the plaintiffs and of their property.

7. In holding that to constitute due process of law within the meaning of the constitution of the United States, it was not necessary for the defendants, or said so-called drainage district, to notify the plaintiffs of the application to the county judge for the appointment of appraisers, or to afford them an opportunity to be present at the time and place of the choosing of such appraisers and participate therein, said proceeding being in plain violation of that part of the 14th amendment of the constitution of the United States, which guarantees to the plaintiffs due process of law.

8. In holding that the legislature of Nebraska could and did, by the passage of said Act, confer authority on said defendants and said co-called drainage district to take and injure the property of the plaintiff Henry W. O'Neill by continually submerging and using lot five thereof (being forty acres) without first condemning and appraising the same and making just compensation therefor.

9. In holding that there was a lawful attempt by the defendants and by said so-called drainage corporation and by the appraisers appointed by the county judge on the *ex parte*

application of the defendants, to appraise the damages to be sustained by the plaintiffs by the taking of a right of way over their lands for a drainage ditch or canal, and that a definite line of location was surveyed, marked out and condemned thereon by the defendants, or by competent authority, for that purpose.

10. In holding that said defendants and said so-called drainage corporation could, under said Act, lawfully take the waters from the channel of Elk creek before they reach the lands embraced in the co-called drainage district, and by a ditch or canal, carry them across the lands of the plaintiffs and empty them onto the lands of the plaintiff Henry W. O'Neill, without first condemning the same and appraising the damages that would be sustained thereby, and compensating him therefor, and thus permanently take and submerge lot five of his said land without due process of law.

11. In affirming and giving force to the order of the court holding that the proceedings which were had under said order to incorporate said so-called drainage district, was due process of law and not in violation of the 14th amendment of the constitution of the United States, which reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## II.

## JURISDICTION: MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED.

The constitutionality of chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, and the proceedings thereunder, is directly drawn in question by the petition in this language:

> "15. The plaintiffs aver that the said defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota county,

Nebraska, and have no lawful authority or right whatever *under the constitution of the United States of America* to invade the plaintiffs' said land herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof, *and that to permit them to do so would be a violation of section 21, article 1 of the constitution of the state of Nebraska which provides, that: 'The property of no person shall be taken or damaged for public use without just compensation therefor,' and of section 1, article 14 of the United States of America which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.'*

"16. The plaintiffs aver that the single object and purpose of the defendants in what they intend and threaten to do as herein alleged, is wholly private and in the exclusive pecuniary interest of the so-called corporators of said alleged Drainage District No. 2 of Dakota county, Nebraska, including the defendants and that said alleged Drainage District No. 2 of Dakota county, Nebraska, had no public character or function whatever and does not pretend to have any authority other than that which is strictly private and its alleged incorporation was and is for the exclusive purpose of enabling the defendants and their associates to accomplish in aggregate capacity what the respective individuals thereof could not do, that is, to take the private property of other private citizens, including the plaintiffs herein, for strictly private uses and purposes and for their own individual benefit *in violation of the constitution of the state of Nebraska and of the constitution of the United States of America*" (Record, pp. 6, 7; fols. 10, 11).

And again in the reply:

"These plaintiffs further replying to said answer aver that sections 14, 15, 16 and 17 of the act of the legislature of the state of Nebraska, for the year 1905, entitled, 'An Act for the organization and government of Drainage Districts, etc.,' approved March 29, 1905, are unconstitutional and void under the provisions of the constitution of the state of Nebraska set out and copied in paragraph two hereof, *and of section 1 of the 14th amendment to the*

*constitution of the United States of America,* * * *. And section 15 of said first act is unconstitutional and void under the provisions of the constitution of the state of Nebraska herein set out *and of section 1 of the 14th amendment to the constitution of the United States of America,* * * * . And the said sections of said acts are in violation of *section 1 of the 14th amendment of the constitution of the United States of America* which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' *as said sections of said acts, as well as said entire acts, abridge the privileges and immunities of the plaintiffs and of each of them, who are and at all times heretofore have been citizens of the United States, and deprive them and each of them of their property without due process of law and deny to them and to each of them the equal protection of the laws"* (Record, pp. 14, 15, 16; fols. 24, 25, 26).

Again the question was brought to the attention of the state court in an assignment of error thus:

The plaintiffs and appellants * * * assign as error the judgment of the district court in holding Drainage District No. 2 to be a corporation, (and) as (not) in violation of section 1 of the 14th amendment of the constitution of the United States (Record, p. 179; fol. 304).

We insert the words "and" and "not" in parenthesis to supply an ellipsis.

The attention of the supreme court of Nebraska was also brought to the question, in this language:

The plaintiffs and appellants * * * assign as error the order * * * adjudicating * * * a public corporation clothed with authority to exercise the right of eminent domain and to condemn and take their lands through which to dig a drainage canal (Record, p. 179; fol. 304).

And likewise by the 7th assignment in the state court, in questioning the right of the defendants to take, "and condemn the land of Henry W. O'Neill north of the lake, which will be flooded by the waters of the ditch" (Record, p. 180; fol. 305).

And by assignment 10, that:

Drainage District No. 2, so-called, is not and never was a corporation under the laws of Nebraska, and is not and never was clothed with authority to exercise the right of eminent domain (Record, p. 180; fol. 305).

The challenge is repeated in the motion for a rehearing, as follows:

3. Because the court declined and failed to consider the third assignment of error.

2. Because the court declined to consider or determine the second assignment of error.

7. Because the court improperly decided the seventh assignment of error.

10. Because the court * * * in deciding and determining that Drainage District No. 2, so-called, was and is a corporation under the laws of Nebraska, and clothed with authority to exercise the right of eminent domain (Record, p. 160; fol. 264).

And this was the understanding of counsel for the defendants when they stated in their brief in the supreme court of the state (p. 22) that the "plaintiffs in error have neither been denied the equal protection of the laws nor been deprived of their property without due process of law within the meaning of the 14th amendment to the constitution of the United States."

And when they further said (p. 23):

> "The 14th amendment does not deprive a state of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or elected by the people."

And on page 24 where they say:

> "Nor does that amendment deprive a state of the power to compel a township as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain. * * *

> When the law has been construed by the highest court of the state in which it was enacted, and it has been uniformly held that the law is not in contravention of the constitution of the state, that construction is binding on the federal courts."

And in counsel's brief (p. 42), in which they say: "The record so made has been *affirmed in all things* by the highest court of Nebraska."

Such was the understanding of the supreme court of Nebraska when it said in this case (93 Neb. 786, 788):

> "A large number of questions are presented and discussed at length by the appellants, but we feel constrained to confine our discussion to the more important ones. * * * Another contention of the plaintiffs is that, under our statute, a drainage district is not a public corporation, and that the attempt to give it the power of eminent domain is unconstitutional. * * * (789). The plaintiffs contend that it is not within the power of the legislature to authorize a portion of the property owners in a proposed drainage district to force others in the district to consent to the incorporation and to 'bear the burden and liability of such an organization.' * * * The same objection would apply to the organization of counties, townships, villages, and other similar subordinate public corporations."

The motion "to dismiss *and* affirm" (see defendants' brief, p. 2), should be denied. It is conjunctive in form and calls for an order of dismissal *and* an affirmance, which is an impossibility. If the motion to dismiss were sustained, the case would pass beyond the jurisdiction of the court and the judgment of the supreme court of Nebraska could not be affirmed.

*Wilson* v. *Bell,* 20 Wall. 201, 22 L. Ed. 259.

The motion to dismiss is directed against the writ of error "for want of jurisdiction, and because the paper purporting to be a writ of error is informal, irregular and insufficient on the grounds stated in the annexed argument, and upon other grounds."

The writ of error is strictly formal and properly attested (Record, pp. 174, 175; fols. 292, 293). It is in accordance

with established precedent. Taylor's Jurisdiction and Procedure of the United States Supreme Court (ed. 1909), pp. 842, 845; Phillip's Practice (ed. 1874), pp. 368, 369; Ware's Pamphlet, From Court to Court, pp. 53, 54.

It should have been based upon some specific ground and the court ought not to be required to search the entire record and the brief of the defendants, to find grounds, upon which to sustain it.

The motion should be denied, as "want of jurisdiction and irregularity of the writ are the only grounds for dismissal."

*Hecker* v. *Fowler*, 1 Black. 95, 96; 17 L. Ed. 45.

In *Sparrow* v. *Strong*, 3 Wall. 97, 105; 18 L. Ed. 49, 50, it is said:

> "And the record shows that the writ has been regularly sued out and returned. This court, therefore, has jurisdiction, and it has been repeatedly held in similar cases, *Minor* v. *Tillotson*, 1 How. 288; *Hecker* v. *Fowler*, 1 Black. 95, 17 L. Ed. 45, that on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction. Other questions, must, in general, await final hearing."

In *Blythe* v. *Hinckley*, 180 U. S. 333, 338; 45 L. Ed. 557, 561, Mr. Justice Peckham said:

> "The motion to dismiss the writ of error in this case, for lack of jurisdiction, must be denied. The objections raised by the complaint to the validity of the judgments mentioned therein were that they were void for want of jurisdiction in the courts which rendered them over the questions decided, because of the provisions of the federal constitution above recited. *Although the claim may not be well founded, the question, nevertheless, was duly raised, and its federal character cannot be disputed.* This necessitates the denial of the motion to dismiss."

In *American Sugar Refining Company* v. *State of Louisiana*, 179 U. S. 88, 91; 45 L. Ed. 102, 103, Mr. Justice Brown said:

> "Motion was made to dismiss this writ of error upon the ground that the case did not present a federal question, inasmuch as the question of illegal discrimination 'was not the principal matter litigated, but was put in

the record for the purpose of obtaining this writ of error.' As, however, the protection of the 14th amendment was invoked in the answer, and, as this defense is at least plausible upon its face, the motion to dismiss must be denied; but, the case having also been submitted upon the merits, we shall proceed to discuss the constitutional objection to the act."

In *Virginia-Carolina Chemical Company* v. *Kirven,* 179 U. S. 252, 256, 257; 54 L. Ed. 179, 184, Mr. Justice McKenna said:

"A motion is made to dismiss the writ of error, on the grounds (1) that the assignment of errors in the supreme court of the state lacked certainty of specification, as it only stated that the refusal by the trial court to give proper and full credit to the judgment of the circuit court *'thereby denied to the defendant (the Chemical Company), a right arising under the authority of the United States.'* This, it is contended, is not sufficient to raise a federal right. * * * In the case at bar there is a definite right arising under the authority of the United States, and the decision of the court was in effect against it. The case falls within *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.,* 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472; *Pittsburg, C. C. & St. L. R. Co.* v. *Long Island Loan & T. Co.,* 172 U. S. 494, 43 L. Ed. 528, 19 Sup. Ct. Rep. 238; *Deposit Bank* v. *Frankfort,* 191 U. S. 499, 48 L. Ed. 276, 24 Sup. Ct. Rep. 154."

In *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 229, 230, 231, 232; 41 L. Ed. 979, 982, 983, Mr. Justice Harlan said:

"The questions presented on this writ of error relate to the jurisdiction of this court to re-examine the final judgment of the supreme court of Illinois, and to certain rulings that part of the 14th amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction. * * * The motion by the city to dismiss the writ of error for want of jurisdiction will be first considered. If the right now asserted under the constitution of the United States was specifically set up or claimed by the defendant in the state court, the motion to dismiss must be overruled. U. S. Rev. Stat., Sec. 709. * * * It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the constitution of the United States. *It is sufficient if it appears from the record that such right was*

*specially set up or claimed in the state court in such manner as to bring it to the attention of that court.* * * * There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the national constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon the merits."

In *Semple* v. *Hager*, 4 Wall. 431, 435; 18 L. Ed. 402, the court says:

"This is a motion to dismiss the writ of error for want of jurisdiction. In all such cases the court must necessarily examine the record to find the questions decided by the state court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits."

In *Lynch* v. *DeBernal*, 8 Wall. 311; 19 L. Ed. 395, 396, it is said:

"The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy. The motion to dismiss for want of jurisdiction will, therefore, be denied; but may be argued upon the hearing of the cause.

In *Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574, 585; 28 L. Ed. 1084, 1086, it is said:

"The supreme court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of state proceeded, are repugnant to the national constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States, has been withheld or denied by the judgment below. *And our jurisdic-*

*tion is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument.* Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

In *Eureka Lake and Yuba Canal Company* v. *Superior Court of Yuba County et al.*, 116 U. S. 410, 418; 29 L. Ed. 671, 673, it is said:

"It does not appear affirmatively on the face of the record that the orders of the superior court were objected to in the supreme court on the ground that in the absence of personal service of the order to show cause on some officer or authorized agent of the corporation, the judgment in the contempt proceeding was without due process of law and therefore contrary to the fourteenth amendment of the constitution of the United States; *yet that point is made here, and it is possible its decision was necessarily involved in the final order that was made. For this reason the motion to dismiss is overruled.*"

In *Kaukauna Water Power Company* v. *Green Bay & Mississippi Canal Company*, 142 U. S. 254, 282; 35 L. Ed. 1004, 1009, it is said:

"(1) The only question involved in this case proper for us to consider, is whether the act of the legislature of Wisconsin of August 8, 1848, reserving to the state the water power created by the erection of the dam over the Fox river, as construed by the supreme court of the state, and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law. Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. *This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such*

*question were necessarily involved in the disposition of the case by the state court. Wilson* v. *Black Bird Creek Marsh Co.*, 27 U. S. 2 Pet. 245 (7:412); *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 281 (10:965); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 (28:1084); *Eureka Lake & Y. Canal Co.* v. *Yuba County Super. Ct.*, 116 U. S. 410 (29:671)."

In *Central of Georgia Ry. Co.* v. *Wright*, 166 Fed. Rep. 153, at page 157, it is said:

"It is the claim made by the complainant which must determine the existence or non-existence of a federal question. *Osborn* v. *United States Bank*, 9 Wheat. 738-823, 6 L. Ed. 204; *Tennessee* v. *Union Planters' Bank*, 152 U. S. 454-455, 14 Sup. Ct. 654, 38 L. Ed. 511; *Vicksburg Waterworks Company* v. *Vicksburg*, 185 U. S. 65-68, 22 Sup. Ct. 585, 46 L. Ed. 808."

In *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wall. 116-155; 17 L. Ed. 571, 575, it is said:

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the constitution of the United States, and do not point out the special clause of the constitution supposed to render the act invalid.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States. *And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the constitution is the one involved in this case.'*"

In *Furman* v. *Nichol*, 8 Wall. 44-64; 19 L. Ed. 370, 375, Mr. Justice Davis says:

"It is urged that the particular provision of the constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record

shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. *And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.*"

In *Satterlee* v. *Matthewson*, 2 Pet. 380, 409, 410; 7 L. Ed. 458, 468, the question was whether a Pennsylvania statute was repugnant to the constitution of the United States, and whether it was properly drawn in question under section 25 of the judiciary act of 1789. The court said:

"Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. 2 *Wheaton* 363; 4 *Wheaton* 311; 12 *Wheaton* 117. One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question."

In *Chambers* v. *Baltimore & Ohio Railroad Company*, 207 U. S. 142, 148; 52 L. Ed. 143, 146, the court said:

"The defendant objects to our jurisdiction to re-examine the judgment because the federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the supreme court that the federal question was assumed to be in issue, was decided against the claim of federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error. *San Jose Land & Water Co.* v. *San*

*Jose Ranch Co.*, 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; *Montana ex rel Haire* v. *Rice*, 204 U. S. 291, 51 L. Ed. 490, 27 Sup. Ct. Rep. 281."

In *Hunter* v. *Pittsburg*, 207 U. S. 161, 175, 176; 52 L. Ed. 151, 158, the question was whether a Pennsylvania act was in conflict with the constitution. The court said:

"The case is here upon writ of error, and the assignment of errors alleges that eight errors were committed by the supreme court of the state. This assignment of errors is founded upon the dispositions by the state courts of the questions duly raised by the filing of the exceptions under the provisions of the act of the assembly. The defendant in error moved to dismiss the case because no federal question was raised in the court below or by the assignment of errors, or, if any federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs in error claimed that the act of assembly was in violation of the constitution of the United States, and specially set up and claimed in the court below rights under several sections of that constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits."

In *Louisville & Nashville Railroad Company* v. *Melton*, 218 U. S. 36, 46, 48; 54 L. Ed. 921, 925, 927, Mr. Justice White, now Mr. Chief Justice White, said:

"Before trial, permission being granted, the railway company, by an additional amendment (to its answer), defended on the ground that the Indiana statute relied upon, if held applicable to the facts alleged, was repugnant to the constitution of Indiana and to the equal protection clause of the 14th amendment. The averments on this subject were lengthy, and concluded as follows: 'Defendant distinctly raises the federal question that the said statute, in so far as made to apply to the facts in this case, is violative of said provision of the constitution of the United States and void.' The provision referred to, as shown by the context, was the equal protection clause of the 14th amendment. * * * We primarily dispose of a motion to dismiss, which is rested

upon the ground that the federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following consideration: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented."

As strictly applicable to this point, see the following cases:

*Wilson* v. *The Black Bird Creek Marsh Co.*, 2 Pet. 245, 251; 7 L. Ed. 412, 414.

*Crowell* v. *Randell*, 10 Pet. 368, 392, 393, 394, 396, 397, 398; 9 L. Ed. 458, 467, 468, 470.

*Murdock et al.* v. *The Mayor and Aldermen of Memphis*, 20 Wall. 590, 642; 22 L. Ed. 429, 446.

*Murray* v. *Charleston*, 96 U. S. 432, 449; 24 L. Ed. 760, 761, 762.

*Green Bay & Mississippi Canal Co.* v. *Patten Paper Company*, 176 U. S. 58, 67, 68; 43 L. Ed. 364, 368.

*Dewey* v. *Des Moines*, 175 U. S. 193, 200; 43 L. Ed. 665, 667.

*St. Louis, Iron Mountain & Southern R. R. Co.* v. *Taylor*, 210 U. S. 281, 296; 52 L. Ed. 1061, 1067.

*Powell* v. *Supervisors of Brunswick County*, 150 U. S. 433, 440; 37 L. Ed. 1134, 1136.

*Sayward* v. *Denny*, 158 U. S. 180, 184; 39 L. Ed. 941, 942.

*Home for Incurables* v. *City of New York*, 187 U. S. 155, 157; 47 L. Ed. 117, 118.

*Mutual Life Insurance Company of New York* v. *McGrew*, 188 U. S. 291, 308, 309; 47 L. Ed. 480, 484, 485.

*State of Montana ex rel. Haire* v. *Rice,* 204 U. S. 291, 299; 51 L. Ed. 490, 494.

*St. Louis, Iron Mountain & Southern R. R. Co.* v. *Hesterly,* 228 U. S. 702, 704; 57 L. Ed. 1031, 1033.

*Armstrong* v. *The Treasurer of Athens County,* 16 Pet. 281, 285; 10 L. Ed. 965, 966.

*Chicago, B. & Q. R. Co.* v. *The State of Illinois ex rel. Grimwood,* 200 U. S. 565, 580; 50 L. Ed. 596, 604.

*West Chicago Street R. Co.* v. *Illinois ex rel. Chicago,* 202 U. S. 506, 519, 520; 50 L. Ed. 845, 850.

*Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company.* v. *Bay,* 200 U. S. 179, 182; 50 L. Ed. 428, 432.

*Arrowsmith* v. *Harmoning,* 118 U. S. 194, 196; 30 L. Ed. 243.

*The Commonwealth Bank of Kentucky* v. *Griffith,* 14 Pet. 56, 58; 10 L. Ed. 352, 353.

*Home Ins. Co. of New York* v. *The City Council of Augusta, Georgia,* 93 U. S. 116, 123; 23 L. Ed. 825, 826.

In *Harding* v. *Illinois,* 196 U. S. 78, 84; 49 L. Ed. 394, 396, Mr. Justice Day stated what constitutes the record in this language:

> "We are to try the case upon the duly certified record, legally made in the state court, and upon which its decision rests. *Powell* v. *Brunswick County,* 150 U. S. 433, 439; 37 L. Ed. 1134, 1136; 14 Sup. Ct. Rep. 166."

And Mr. Bunn, in his book entitled United States Courts, pp. 19, 20, 21, says:

> "The record means, in law cases, the pleadings, judgment and bill of exceptions, if any; in equity cases, the pleadings, decree, orders and all the evidence. The record does not include the briefs or arguments of counsel, or evidence in law cases not preserved in a bill of exceptions. * * * How should the record be made to show such a federal question? To clarify the answer let us illustrate. The constitution says no state shall pass any law impairing the obligation of a contract. Suppose suit is brought in a state court on a contract, and the defendant relies

on some state law which in effect does away with the contract or injuriously modifies it. If the action is at law there would be a trial by jury in the state court. Plaintiff should request the judge to charge the jury to disregard the state statute, because it impairs the contract and is void under the constitution of the United States. Should the judge differ, he will refuse so to instruct and will hold the state statute good. To this ruling an exception should be taken and incorporated in a bill of exceptions signed by the judge. This makes the point a part of the record, and if plaintiff is finally defeated in the state court of last resort, he may then take this federal question to the United States supreme court on writ of error. In an equity suit, on the other hand, if the complainant has such a question, he should present it by proper averments in his bill. If the defendant intends to raise such a question, he should do it in his answer. However, it is not absolutely necessary to have the federal question thus explicitly stated in the record, provided the court can see by reading the record that the question was necessarily involved and must have been decided. *Furman* v. *Nichol*, 8 Wall. 44, 19 L. Ed. 370; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140, 25 L. Ed. 114; *Roby* v. *Colehour*, 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922."

Now it is to be borne in mind that this is a suit in equity, and as such was triable and tried *de novo* in the supreme court of the state; and as applicable thereto, section 639 of the Code of Civil Procedure, provides:

"In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

In *Tate* v. *Kloke*, 93 Neb. 382, it is said in the syllabus:

"The issues presented by appeal to this court in a suit in equity must be tried *de novo*, and a proper decree entered or directed."

In *Horst* v. *Lewis*, 71 Neb. 370, 372, it is said, in the *syllabus*, on an application for a rehearing:

> "The fact that all assignments of error are not noticed and commented upon in the opinion, does not imply that they have not been considered and given due weight in arriving at a decision."

In that case (p. 372), 166 errors were assigned by counsel, but only 3 were decided, or commented on by the court. Attention being called to the fact, in an application for a rehearing, it said in the opinion (p. 382):

> "It does not follow that because a fact or an authority, deemed important by counsel, has not been noticed or commented upon in the opinion, it has not been considered and due weight given to it in arriving at the decision. *In many cases, facts incorporated in the record and discussed at length by counsel, are considered by us wholly unimportant, and authorities from which long quotations are made inapplicable. Dammert* v. *Osborn*, 141 N. Y. 564."

In addition, therefore, to the averments of fact upon the face of the record, which invest this court with jurisdiction, it is conclusive that the supreme court of Nebraska considered every issue presented by the pleadings and the evidence, and that it could not enter a judgment in favor of the defendants without affirming the constitutionality of the act, thus making it conclusive that its validity was drawn in question and decided adversely to the plaintiffs' contention.

In this connection, it is not out of place to direct attention to the fact that, under the practice in Nebraska, the sufficiency of a pleading can be challenged by a motion to make more specific, by a demurrer thereto, or by an objection to the introduction of evidence thereunder; and if it is not thus challenged, it is sufficient. The sufficiency of neither the petition, nor the reply was in any way questioned.

The case is, clearly therefore, within the provisions of section 237 of the judicial code of March 3, 1911, and the motion to dismiss should be denied.

The motion to affirm is equally inadmissible. Paragraph 5 of rule 6 reads thus:

> "The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. * * *"

The contention of defendants' counsel in their brief (pp. 38-72), that this court is bound by the construction placed upon the drainage Act by the state court, in the cases cited by them (pp. 38-39), is unsound.

The constitutionality of chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, is *res integra*. After a diligent search we have been unable to find an instance in which the validity of this Act, or of a like act has under the federal constitution been presented to or passed upon b ythis court; or presented to or passed upon by the state court, *except in this case*.

If counsel's contention were true, it would follow that, there being forty-eight states and forty-eight different appellate tribunals, there might be forty-eight differing judicial opinions of the constitutionality of this, or of a like act, and all in force at the same time in the respective states.

It is plain that such a holding would lead to inextricable confusion, a situation never contemplated by the framers of the federal constitution. And so it is equally clear that where, in good faith, a party litigant shows upon the face of the record that a statute or judgment, decree or order of a state government, or of any of its branches, or agencies, is in violation of the provisions of the federal constitution, this court is clothed with jurisdiction to revise and reverse the same.

Section 237 of the judicial code provides, that:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The supreme court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, ward execution or remand the same to the court from which it was removed by the writ."

The plaintiffs, in their petition specifically assail the constitutionality of the Act under the 14th amendment; the defendants specifically set up the right under the Act to condemn and take the property of the plaintiffs, and the plaintiffs, by their reply, again specifically challenge the constitutionality of the Act under the federal constitution, and the supreme court of Nebraska necessarily affirmed its validity under the federal constitution in rendering the judgment complained of.

That this court has jurisdiction to review a decision of a state court in a case in which the validity of a state statute is drawn in question as repugnant to the federal constitution where the decision was in favor of its validity, is settled by the foregoing authorities, as well as by the following cases:

*Craig* v. *The State of Missouri*, 4 Pet. 410, 429, 430; 7 L. Ed. 903, 910.

*Byrne* v. *State of Missouri*, 8 Pet. 40, 42; 8 L. Ed. 859, 860.

*Worcester* v. *State of Georgia*, 6 Pet. 515, 541; 8 L. Ed. 483, 494.

*Edwards* v. *Elliott*, 21 Wall. 532-558; 22 L. Ed. 487, 489.

*Daniels* v. *Tearney*, 102 U. S. 415-422; 26 L. Ed. 187, 188.

*Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 129; 30 L. Ed. 342, 345, 346.

*McPherson* v. *Blacker*, 146 U. S. 1, 42; 36 L. Ed. 869, 873.

*Sulley* v. *American National Bank*, 178 U. S. 289, 297; 44 L. Ed. 1072, 1076.

A decision of the federal question in terms is not essential. If a decision of such question were necessarily involved in the judgment, it is not a matter of importance that the state court avoided all reference to it.

*Chapman* v. *Goodnow*, 123 U. S. 540; 31 L. Ed. 235; 8 Sup. Ct. Rep. 211.

*Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574; 28 L. Ed. 1084; 5 Sup. Ct. Rep. 681.

*Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232; 33 L. Ed. 892; 10 Sup. Ct. Rep. 533.

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; 41 L. Ed. 979; 17 Sup. Ct. Rep. 581.

*St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203; 46 L. Ed. 872; 22 Sup. Ct. Rep. 616.

*F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 660; 41 L. Ed. 1149, 1151, 1152.

"All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. And of course where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. *Missouri, Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 530, 533, 534; 46 L. Ed. 673, 676."

The question is settled by the following cases:

In *Scott* v. *McNeal*, 154 U. S. 14, 45; 38 L. Ed. 896, 901, it is said:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683; 36 L. Ed. 1123, 1133; *Mobile & Ohio R. Co.* v. *Tennessee, ante*, p. 793."

In *Mobile & Ohio R. Co.* v. *Tennessee*, 133 U. S. 486, 493; 38 L. Ed. 793, 796, it is said:

> "Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the supreme court of a state whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a supreme court of a state?"

See also as directly applicable:

*Huntington* v. *Attrill*, 146 U. S. 657, 689; 36 L. Ed. 1123, 1133.

*Ohio Life Insurance Co.* v. *DeBolt*, 16 How. 416, 432, 433; 14 L. Ed. 997, 1001.

It is held that to justify the conclusion that a pleading is frivolous, it must be not only without adequate reason, but so clearly and plainly without foundation that the defect ap-

pears upon mere inspection and indicates that its interposition was in bad faith.

*Cook* v. *Warren*, 88 N. Y. 37, 38.
*Youngs* v. *Kent*, 46 N. Y. 672, 674.
*Lerdall* v. *Charter Oak Life Ins. Co.*, 8 N. W. 280, 283.

This being a case in which analysis and exposition are necessary to determine the validity of the Act involved, the writ of error can not be said to be frivolous.

*Louisville & Nashville Railroad Company* v. *Melton*, *supra*.

It is not to be believed that the plaintiffs, Nebraska farmers living distant fifteen hundred miles from the national capital, would incur the expense and inconvenience necessary to the presentation of the questions involved out of sheer obstinacy, or a desire for delay, and that in doing so they acted in bad faith.

The motion to affirm should be denied and the case heard upon its merits.

## III.

## A REVIEW OF THE NEBRASKA CASES CITED BY COUNSEL FOR THE DEFENDANTS.

Although it is clear that the court is not bound by the decisions of the state court where the question is a conflict between a statute of the state and the federal constitution, doubtless, it will clarify the situation somewhat to make a brief *resume* of the Nebraska cases cited by counsel for the defendants.

Nebraska was admitted to the Union March 1, 1867, and the 14th amendment was adopted July 28, 1868, less than sixteen months thereafter. Practically, therefore, Nebraska has lived her entire political life, if the expression is admissible, under the federal constitution as thus amended.

*Jenal* v. *Green Island Draining Company*, 12 Neb. 163, was decided in 1881. It involved the constitutionality of a statute

authorizing a drainage corporation to condemn and take the land of other persons for ditch purposes.

In holding the statute void, the court said (166-167):

> "Sec. 21, Art. 1, of the constitution, provides that: 'The property of no person shall be taken or damaged for public use, without just compensation therefor.' The legislature possesses no authority, however, to take the property of one citizen and transfer it to another, even where full compensation is made. *Reeves* v. *Treasurer*, 8 Ohio State 346; *Cooper* v. *Williams*, 5 Ohio 393; *Osborn* v. *Hart*, 24 Wis. 90; *Bankhead* v. *Brown*, 25 Iowa 540. The law guarantees to every one the free use and enjoyment of his property, and he can be required to surrender it only when it is required for public use, and upon full compensation being made. The statute in question authorized the entry upon lands and construction of drains, whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. There is no requirement in the act that the corporation shall act only in cases where the public welfare would be advanced. And there are no conditions upon which their right to locate a ditch depend, except that they are the owners of wet or overflowed lands. A ditch may be located and opened across the lands of individual owners merely to subserve private interests. Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is unauthorized and void. Even the board of county commissioners have no authority to authorize the location or construction of drains, except where they 'will be conducive to the public health, convenience or welfare.'"

Thirteen years thereafter, or in 1894, *Welton* v. *Dickson*, 38 Neb. 767, which involved the constitutionality of an act authorizing the condemnation and taking of land for private purposes, was decided, and it was held unconstitutional, and *Jenal* v. *Green Island Draining Company* (775-776), was cited with approval.

*Prewitt* v. *York County*, 43 Neb. 267, 268, was decided in 1895, and the Jenal case was again cited with approval.

*Paxton & Hershey Irrigating Company* v. *Farmers & Merchants Irrigation Company*, 45 Neb. 884, 894, was decided in 1895, and the Jenal case was cited with approval.

*The Jenal case has never been modified, or overruled.*

In *Neal* v. *VanSickle*, 72 Neb. 105, 107, the opinion was by Commissioner Ames, and the Jenal case was cited and held not to conflict therewith. The Neal case involved the constitutionality of chapter 116 of the laws of 1903, but the commissioner refers to it as article 4, chapter 89 of the compiled statutes and as sections 5566-5579 of Cobbey's annotated statutes.

For the first time in the history of Nebraska, provision was made by this Act for the creation of a corporation by compulsory means,—that is, *by an order, judgment, or decree of a court*. But chapter 116 of the laws of 1903 was repealed by chapter 161 of the laws of 1905 (Sec. 38).

After discussing the question whether the district was a public or a private corporation, Commissioner Ames held that the *procedure by which it was created* was not in violation of the state constitution. But this point was *obiter*, because he further held (110) that a part of the Act was in conflict with the state constitution and, therefore, void, and the case was reversed on that point.

*Obiter* is not binding on the Nebraska courts.

*Mosher* v. *Huwaldt*, 86 Neb. 686.

*Barnes* v. *Minor*, 86 Neb. 189, 194, was decided in 1907; but it simply involved the right of the legislature to delegate to the courts power to create a corporation by judicial decree, and in no manner touches the substantive law of the state as announced in the Jenal case. The only thing held in the Barnes case is that the Act of 1905 did not violate the state

constitution, because the legislature conferred upon the district court the power to create a drainage corporation. *That case relates simply to the procedure.*

The concluding language in the Barnes case is significant: "So, *without determining any question which may be subsequently raised touching the validity or constitutionality of the act,* we are of the opinion that the appellant's criticism is not well taken, and, *so far as this point is concerned,* the act is constitutional." But this language was also *obiter* as the case turned on another point.

But in *Dodge County* v. *Acom,* 61 Neb. 376, and in *Tyson* v. *Washington County,* 78 Neb. 211, the court held that the power to create a corporation was legislative and properly delegated to an administrative board.

*State* v. *Hanson,* 80 Neb. 724-729, was *quo warranto* to vacate the charter of the company and was decided in 1908, the opinion being written by Commissioner Epperson. It involves the constitutionality of chapter 153 of the laws of 1907 (474, 485), which provides for the creation of a drainage district by the board of supervisors, or county commissioners of a county. (The county administrative board is variously known in Nebraska as the board of supervisors, or board of county commissioners.) The decision is based upon and centers around the opening sentence of the Act, "whenever it will be conducive to the public health, convenience, or welfare, either to drain any wet lands, etc. * * "

In a somewhat elastic opinion, the Commissioner used, *inter alia, this* language (729):

> *"A few individuals cannot for their private purposes, create a drainage district and impose the burdens thereof upon their neighbors. Neither can a few, or many, acting in their individual interest, prescribe the boundaries of the proposed district.* * * * (730). That the legislature may delegate to the administrative officers, the power to determine whether a particular improvement will be conducive to the public health, convenience and welfare, is an established rule. The same function may

be delegated to the electors of a municipality. * * * (740). It is equally well settled that the machinery of the government will be thus placed in operation only when the contemplated reclamation or protection by drainage * * * and other similar improvements are necessary in order to promote the public health, convenience or welfare, and that individuals cannot through the agency of the government, thus improve their own property when the public health, convenience or welfare will not be promoted thereby. * * * (742). It is evidently the intention of the legislature that such improvements should not be brought about except that it be for the public health, convenience, or welfare * * *. The inference that the county board shall determine the public utility of the proposed improvement is not only permissible, but a necessary construction to be placed upon the language used. * * *"

*Drainage District No. 1* v. *Richardson County,* 86 Neb. 355, 366, was decided in 1910. In that case the drainage corporation was created under chapter 161 of the laws of 1905 by an order, or decree of the district court. Following the *obiter dicta* of the Neal case, 72 Neb. 105, the court held in substance: (1) that the corporation was public and not private; (2) that the statute was not in violation of section 1, article 2 of the state constitution distributing the powers of the state government into three separate departments, and that the power to create a corporation by judicial order, or decree, might be granted. *That case pertains merely to the procedure by which the corporation was created.*

*O'Neill* v. *Leamer,* 93 Neb. 786, 791, the case at bar, decided in 1913, involves the constitutionality of chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, because it is in conflict with the 14th amendment of the Federal constitution. It is the first case in the history of the state in which that question has been presented to the state court. None of the cases cited by counsel for the defendants touch this point.

Now as to whether the power to create a corporation is a legislative or a judicial power, Commissioner Ames, in *Dodge County* v. *Acom,* 61 Neb. 376, in considering the constitution-

ality of chapter 51 of the laws of 1881, held that the legislature rightly delegated it to the board of county commissioners, an administrative body, as (388): (1) It dealt with the public health, convenience, etc., and (2), "The exercise of this power is not judicial. * * * It is the exercise of a delegated power, political or administrative in character, conferred upon the county board by the sovereign authority of the state acting through its legislative branch of government" (289-290).

*Dodge County* v. *Acom, supra,* was before the court in 72 Neb. 71, but the constitutionality of the Act was not discussed or decided.

In *Tyson* v. *Washington County,* 78 Neb. 211, the opinion was by Commissioner Ames. There the district sought to be organized under chapter 51 of the laws of 1881, and certain remonstrants filed objections thereto before the board of county commissioners, which were overruled, and they appealed to the district court where their appeal was dismissed because the order of the board was final. The power granted being administrative and not judicial, the order, therefore was not appealable, although the statute expressly gave the right of appeal. In holding that the appeal was properly dismissed, notwithstanding the statute specifically gave it, the Commissioner took occasion to clearly distinguish between legislative and judicial power, and held that the power to create a corporation could not be delegated to the courts. He goes into the cases somewhat at length and concludes (226): "The courts are incompetent to determine whether the proposed ditch will be conducive to the public health, convenience, or welfare, or whether the route thereof is practicable." Thus holding that such a provision of the Act is a legislative and not a judicial power.

Of these decisions, it is to be observed that in *Neal* v. *Van Sickle,* 72 Neb. 105; *Dodge County* v. *Acom,* 61 Neb. 376; 72 Neb. 71; *Tyson* v. *Washington County,* 78 Neb. 211; and *State* v. *Hanson,* 80 Neb. 724, the opinions were written by court commissioners, and, "such opinions are of no value as author-

ity or precedent. * * * The doctrine of *stare decisis* has no application to opinions of this character. * * * The court approves only the conclusions."

*Flint* v. *Chauloupka,* 72 Neb. 34, 40.

*Modern Woodmen of America* v. *Coleman,* 68 Neb. 665, 667.

*Hoagland* v. *Stewart,* 71 Neb. 106, 107.

So the contention of defendants' counsel is without merit.

IV.

## IS CHAPTER 161 OF THE LAWS OF 1905, AS AMENDED BY CHAPTER 147 OF THE LAWS OF 1909, KNOWN AS THE PEABODY ACT, IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

For the sake of convenience, and because we think it will be conducive to clearness, we group and condense the assignment of errors under the above heading.

Long before counsel for the defendants shall have reached the question whether the state may, directly, or by any agency of its choice, or by such *procedure* as it may see fit to adopt, create a drainage corporation, and clothe it with the power of eminent domain, the nature and purpose of which is strictly private, they will be confronted by the stubborn objection that the Act is in violation of the 14th amendment, because it authorizes the taking of private property for a private use and violates the privileges and immunities clause of the constitution.

### An Analysis of the Act.

That a corporation authorized by this Act is private, is indisputably proved by the following, among other words and phrases:

The Act opens with the declaration that, "*A majority in interest of the resident owners* * * * may organize a drainage district *for the purpose of having such lands reclaimed*

*and protected from the effects of water by drainage, or otherwise"* (Sec. 1). But by this section, as amended, the word "resident" is omitted and the sentence reads that, "A majority in interest of the owners * * *" may compel the creation of a drainage corporation by judicial fiat regardless of the will of other owners, and thus take their property for its own use. It is stated that the *object* of the organization is, *"for the purpose of having such lands reclaimed and protected from the effects of water by drainage, or otherwise"* (Sec. 1). It is said that taxes and assessments may be levied "to pay the expenses *to make the improvements that may be necessary to effect the drainage of said lands so formed into a district* * * *" (Sec. 1). And in section 1, where, in speaking of the petition for the organization, it is said it shall pray *"that they (the petitioners and defendants) may be declared a drainage district under this article."*

It appears in section 2, where, in speaking of the summons, it is said: "It shall be directed to the several owners of real estate *who may be averred to be benefitted thereby,"* and the summons shall notify the defendants that their property will be rendered liable for taxation, *"for the purpose of draining said district, and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same."*

It is manifest in section 3 where persons summoned to answer the proceeding to organize are permitted to file objections, and "show why such drainage district shall not be organized and declared a public corporation of this state, *and why their lands will not be benefitted by drainage* * * *," and by the statement that, "in case any owner * * * shall satisfy the court *that his real estate, or a part thereof, will not be benefitted thereby* * * * the court may exclude such real estate as *will not be benefitted, and declare the remainder a district as prayed for."*

It is evident in section 3 where the clerk of the district court has called a meeting for the selection of directors or "supervis-

ors," it is said: *"At such election each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in said district."* And in section 9 in which it is said: "The said engineer shall also make an estimate of the cost of the entire *drainage works and improvements required in said district to protect and reclaim said lands and property* * * * ."

Its private nature is apparent in section 10 by which the "supervisors" are to elect a "drain commissioner" who "shall have a general supervision of all the works put under contract by said district subject to the *supervision and control of said board of supervisors."*

It appears in section 11 which authorizes the chairman to begin an action in the district court to bring outlying land into the corporation and subjecting it to the burden of the "improvement"; and in section 18 where it is said: "The board of supervisors may levy such other and further installments as may be necessary to complete said *work and improvements."*

It is plain by section 20 of the original draft (omitted, however, in section 20 as amended), where, in speaking of the authority of the "board of supervisors" to borrow money and issue bonds, it is said they *"may, with the consent of the owners of not less than a majority of the whole number of acres of said district,"* at an election to be held for that purpose, *"at which election each owner shall have one vote for each acre of land owned by him in said district."*

It is found in section 22 where it is stated that the bonds may be sold, *"to raise money for the construction of said ditches and works, the acquisition of said property and rights and otherwise to fully carry out the object and purpose of this act."*

It is shown in section 28 where a land owner in the district, desiring to drain his land into the ditch, is authorized to maintain an action in the district court and obtain an order giving

him the right to do so, it being said: *"The ditch or drain which he shall construct or cause to be constructed, shall be considered to be conducive to the public health, welfare, convenience and utility, to promote which said drainage district is established."* Such district, it is said: *"Shall be and become a part of the drainage system * * * and be under the control and supervision of the board of supervisors."*

This belated idea of a "public purpose" is here found for the first time and in no other connection. But the declaration is in plain contradiction of section 1 authorizing a "majority in interest" to form a drainage district, *"for the purpose of having such lands reclaimed and protected from the effects of water by drainage or otherwise"*; of section 2 where it is declared that the organization is *"for the purpose of draining said district * * *"* and *"for the purpose of draining and reclaiming the same"*; of section 3 where the objectors may show *"why their land will not be benefitted by drainage"*; and of section 9 where the object is stated to be *"to protect and reclaim said lands and property"*; by section 18, where it is spoken of as a *"work and improvement,"* and by section 22 in which it is said that money may be borrowed by the issuance and sale of bonds, *"to raise money for the construction of said ditches and works."*

Our contention in this behalf is plain beyond doubt when the act is viewed from another angle.

In section 5, where, in speaking of choosing officers at an election to be called by the clerk of the district court, it is said: *"At such election each and every acre of land shall represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in such district."*

Electors living in the territory, but owning no land, are not eligible to vote, the entire power being placed in the keeping of a "majority in interest of the owners"; that is, in the keeping of a majority of the acreage whether owned by a single individual or a corporation and regardless of its value.

It is noticeable in section 8 which provides that the records are open only to owners of real estate within the district. And in section 3 where it is stated that real estate owners who fail to sign the articles of association, but object to the creation of the corporation, may file objections in which they shall *"show why their land will not be benefitted by drainage and should not be embraced in said district."*

It is again manifest where the act repeatedly speaks of the right of stockholders and that each acre shall represent one share of stock.

The private nature of the act is again made plain when viewed from still another angle.

It is seen in the language and policy of section 3, where the minority land owners are brought into court to file objections "if any they have, why such drainage district shall not be organized and declared a public corporation * * *, *and why their land will not be benefitted by drainage* * * *." If they fail to sustain the burden of proof in this respect and overcome the presumption that their land will be benefitted, the court can overrule their objections and incorporate them. But if the objections are sustained, the application is not defeated, as the court is required, in that event, to *"declare the remainder a district as prayed for."*

Again the private nature of the organization is manifest in section 13 where, where at the meeting to be held after the engineer has filed his report, objections to the report may be made by the owner "as to whether the said proposed assessment of benefits exceeds *the benefits derived to their respective lands, and property from the said drainage improvements."* In that case notice of the meeting is to be given (Sec. 14), and the district "by its attorney or any owner of land, or other property in said district whose land, or property may be affected thereby," is authorized "to file objections to the report," and a hearing is to be had by the "board of supervisors." Elaborate judicial proceedings are to be had before the board and judgments or orders may be entered by them.

But an appeal "from the decision of the * * * board on these matters" is absolutely prohibited, and it is clothed with power *"to determine and adjudicate the total amount of benefits that will accrue to each lot, tract, or parcel of land, or other property in said district from the drainage improvement."*

It is deducible from the language of section 16, where it is provided that in such a contest the "board of supervisors" may tax the costs of the hearing to the objectors, if their objections are not sustained.

The nature of the organization is deducible from section 17 where the right of appeal from a decision of the board is recognized, when it is remembered that the appellant is required to give an appeal bond "payable to said drainage corporation, and in addition thereto conditioned that they will pay all damages which may accrue to said drainage district by reason of said appeal." The purpose of this provision is, of course, to intimidate the minority land owners from contesting the right to tax and burden their property.

The private nature of the organization is deducible from section 18 where the board is authorized to "at once levy a tax on the land and other property in said district *to which benefits have been assessed* * * *." And, in this connection, it is to be remembered that the lands of the minority may be sold at tax sale for the non-payment of the taxes and assessments (Sec. 21).

The private character of the organization again appears from the fact that no person residing out of the district is permitted to drain into the corporate ditch; but that right is confined to *"the owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain, or water course* * * *" (Sec. 27).

Another significant fact, pointing indisputably to the private character of the enterprise, is found in the fact that the uni-

versal American doctrine that the majority shall rule, is utterly destroyed. Electors living in the territory sought to be embraced in the district, but not owning real estate therein, are disfranchised. The next step to tie the hands of the minority is in their disfranchisement by giving force to their votes, only, in proportion to the number of acres they own, thus giving the "majority in interest" absolute control of the entire situation.

Now looking at the Act from another point its private purpose is clearly established. A "majority in interest of the owners" may, by the chairman, secure an order from the district court to bring outlying property into the corporation as the court is authorized by a "decree" to annex the same, and when so brought in it is to be treated as *"though incorporated in the original petition and a decree entered thereon."*

The officers of the organization are five directors, or as the act calls them, "supervisors," one of whom is to be chairman (Sec. 5). The board is to be elected annually by a "majority in interest"; the supervisors are authorized to adopt a seal and keep a record of their proceedings (Sec. 8); they are to annually publish a statement of the organization's receipts and expenditures and to receive compensation; they are to employ an engineer and an attorney and have a secretary, who, of course, may be a member of the board; the engineer is to make a complete plan *"for draining, reclaiming and protecting said district"* (Sec. 9); he is to give the location, length and depth of the ditches, length and height of the dykes and levees *"necessary for draining, reclaiming and protecting the land in said district"* (Sec. 9); the "supervisors" are to appoint a "drain commissioner," "whose duty it is to let all contracts for draining the lands" (Sec. 10); it is the duty of the chairman to bring adjoining outlying lands into the corporation (Sec. 11); the board can negotiate with land owners through which they desire to dig a ditch and if they fail, may present a petition to the county court for the appointment of appraisers to ascertain the compensation to be made to such

owners or parties in interest. The appraisers have no other or further jurisdiction. It is the duty of the county judge to appoint appraisers. The supervisors are to *"order the levy or assessment of a tax not exceeding in amount the total benefits to said land by said improvements."* The assessments are to be made by them and a tax levied for its payment governed by rules stated in section 13. A hearing is to be had before them as to the legality or correctness of any assessment and they may *"levy other and further assessments"* (Sec. 13).

Persons owning lands "taken or affected in any way by the improvements" (Sec. 14) have a right to apply to the board for compensation, who are to hear and determine the matter. But they can present no objections to the organization.

The following excerpts from the Act, read in connection with the sentences of which they are parts, are highly significant: "Who will be benefitted thereby," (Sec. 1); "to pay the expenses to make the improvements that may be necessary to affect the drainage of the said lands so formed into a district," (Sec. 1); "to be benefitted thereby," (Sec. 2); "will be benefitted thereby," (Sec. 2); "will be benefitted thereby," (Sec. 3); "drainage works and improvements required in said district to protect and reclaim said lands and property," (Sec. 9); "improvements of said drainage district," (Sec. 9); "said works and improvements," (Sec. 9); "such improvements made on the tract or parcel of land," (Sec. 9); "such works and improvements," (Sec. 9); "improvements or drainage plans," (Sec. 9); "outlet for drainage or protection from overflow or damage by water," (Sec. 9); "benefits derived," (Sec. 9); "improvements and works affording drainage or giving an outlet for drainage, protection from overflow and damage from water," (Sec. 9); "will be benefitted by the drainage improvements," (Sec. 11); "benefitted by the improvements," (Sec. 11); "praying that said tract or tracts of land may be incorporated and made a part of said district," (Sec. 11); "other improvements contemplated," (Sec. 12); "works contemplated by any of the provisions of this act," (Sec. 12); "quantity of

land which is required to be taken," (Sec. 12); "applicable to the drainage ditches and other improvements provided for in this act," (Sec. 12); "said drainage improvements," (Sec. 13); "affecting said lands and property," (Sec. 13); "a complete plan for draining, reclaiming and protecting said district and an estimate of the cost of the proposed drainage improvement," (Sec. 13); "owner of land or other property in said district whose land or property will be affected thereby," (Sec. 14); "drainage improvements recommended," (Sec. 14); "payable to said drainage corporation," (Sec. 17); "may levy at once a tax on the lands and other property in said district to which benefits have been assessed," (Sec. 18); "said works and improvements and the carrying out of the object of said district," (Sec. 18); "in proportion to the benefits assessed," (Sec. 18); "organizing said district," (Sec. 18); "the drainage works and improvements," (Sec. 18); "necessary to complete the works and improvements," (Sec. 18); "property to be benefitted," (Sec. 18); "or other drainage improvements," (Sec. 19); "benefits accruing to the property," (Sec. 19); "laws advantageous to raise money for the protection of said ditches and works, the acquisition of said property and rights and otherwise to fully carry out the object and purposes of this act," (Sec. 22); "affect the drainage of said district," (Sec. 23); "drainage improvements," (Sec. 24); "construction of such improvements," (Sec. 24); "assessed for benefits," (Sec. 28); "the purpose of securing more complete drainage," (Sec. 28); "the assessment of benefits," (Sec. 28); "for benefits of said drainage district," "proper and suitable condition for drainage purposes," (Sec. 32); "for the location, construction and opening of said system of drainage," (Sec. 32); "owner of any land through which such improvement is constructed," (Sec. 32); "for the reclamation of the lands in the drainage district," (Sec. 33); "within their respective districts," (Sec. 33); "liberally construed to promote the drainage and reclamation," (Sec. 35); "necessary to carry out the purposes of this act," (Sec. 37).

Thus epitomized, it will be observed that a "majority in interest of the owners," can obtain a "decree" incorporating the district; it may elect the board of directors, or "supervisors"; it may levy and collect taxes and assessments; it may hold a court and enter judgments and orders from which, in some instances, but not in others, an appeal may be taken, under stringent circumstances; it may issue and sell bonds and dispose of the proceeds; it may petition the county judge for condemnation proceedings; it may go beyond the district boundary and impose a burden upon the lands of others who object thereto for the improvement of its own property; it may elect a "drain commissioner" and the secretary; it may let contracts and pay wages; it may dissolve or continue the corporation; it may force a ditch across the land of the minority, whether wet or otherwise; it may create a grievous and lasting servitude upon the lands of the minority and of persons outside of the district, and may tax all lands in the district to aid the improvement of its own property and thus enhance its value. It has no other purpose.

After the organization has been created, no one of the corporators will have any interest in the property of the others; the lands are to be held in severalty as before.

Mere verbiage to secrete the real object of the organization authorized by this act, however skilfully employed, cannot mislead. The idea runs through the provisions of the Act,—always and everywhere,—that the man, or interest, owning the greatest number of acres, regardless of value, in a given territory which he himself selects, may drain his land and increase its value at the expense of the estates and convenience of his neighbors.

A few simple illustrations will show the far-reaching and inequitable provisions of the Act.

Suppose a "majority in interest of the owners," owns 200 acres of which 150 is overflowed, worth $5 per acre, or $1,000, —that number being "sufficient cause for declaring the public

utility of said improvement and * * * sufficient ground for declaring said organization a public corporation of this state" (Sec. 3). Now, adjoining the property of the "majority in interest of the owners" (and "the majority in interest" may be an infant, or other disqualified person under guardianship, or a resident, or a non-resident corporation), A owns 40 acres, B 40, C 40, D 40, and E 35, or 195 acres of highly improved land worth $100 an acre, or $19,500. Is it not apparent that under such circumstances the act could not stand the test, because it would authorize the taking of the private property of a minority to improve the private property of the "majority in interest," *or the owner of the greatest number of acres?*

Whoever, or whatever a "majority in interest of the owners" may be or mean, it can force the owners of other land into corporate relations with it and to assume duties arising therefrom, regardless of their protests, and create a lasting and grievous servitude on their property, which is to be taxed *ad infinitum* for the payment of its private debts and obligations.

Suppose again, that the Act had gone a step further in the same direction, and had provided that a "majority in interest of the owners" might issue the negotiable note of the organization and mortgage all of the real estate within the district to secure its payment, over the protest of the minority ownership, thus subjecting their property to a liability against which they protested, would such an act be sustained? And yet this precise result may be accomplished by giving a "majority in interest" power to issue and sell the bonds of the organization.

If the "majority in interest of the owners" should happen to be a corporation having a president, vice president, secretary, treasurer and board of directors of its own, what is in the act to hinder it from electing the entire board of supervisors of the drainage district from its membership, making one of them chairman, another drain commissioner, another secretary and three others overseers, thus taking the entire control and management of the situation into its own hands in hostility to the interests of the minority?

Other pertinent illustrations will readily suggest themselves.

We think, therefore, there can be no doubt that the purpose of the Act is to authorize the creation of a private corporation by judicial fiat, to improve and enhance the value of the private property of a "majority in interest" or the ownership of the greatest number of acres, regardless of their value, at the expense and over the protest of the owners of the lesser number of acres, regardless of the fact that the latter may be worth many thousand dollars more than the former.

**The Act Authorizes the Taking of Private Property for a Private Purpose and is Therefore Void.**

It is an important fact that at the time of the passage of the Act, there were a number of statutes in force authorizing the formation of drainage corporations, which have recently been compiled and are to be found in the revised statutes of 1913. Thus article 1, chapter 19 (pp. 467-495), provides for "Drainage by County Commissioners"; article 2, chapter 19 (pp. 495, 499), provides for "Drainage by Incorporated Companies," and article 3, chapter 19 (pp. 499-505), provides for "Drainage for Agricultural and Sanitary Purposes by Individual Land Owners"; each of which is and was complete in itself when chapter 161 of the laws of 1905 was enacted. There was no necessity for the passage of this act, *except to embrace in it a provision authorizing the court to compel reluctant land owners to enter into a relation which they refused to assume.*

It is significant that the Act is the sole legislative attempt to override individual will and to coerce reluctant property owners into a relation and to assume obligations and burdens against which they protested. It attempts to stifle their voice by an order of the court.

It is likewise important to remember that in the "petition and articles of association" (Record, p. 24; fol. 40), it is stated, that: "The object of this organization shall be to reclaim and protect from the effects of water, either of swamp

land, overflowed land or submerged land, by any or all or any portion of the methods provided or permitted by law, the land hereinafter described, and such other lands as may be included within said district in the manner provided by law and for the purpose of carrying out such purposes shall have all the powers conferred or permitted under the law." This avowed purpose runs through the entire proceeding.

The Nebraska court could not escape the conclusion that the act was a violation of the 14th amendment of the constitution of the United States, except by wrongfully classifying it with "counties, townships, villages and other similar subordinate *political* corporations" (*O'Neill* v. *Leamer*, 93 Neb. 786, 789). But the classification is inadmissible and not binding and possesses no other significance than to show that the Nebraska court unsuccessfully attempted to avoid bringing the Act to the test of the federal constitution.

*Farbracke* v. *Drainage District No. 5*, 23 Idaho 85, 128 Pac. 553, 44 L. R. A. (N. S.) 538, 543.

It is elementary that a court cannot create a corporation.

It is said in Marshall on Corporations, (Ed. 1902) pp. 495, 496, that:

> "It is within the power of the legislature to create a public corporation, like a city or town, and make the citizens members of the corporation without their consent. But it is very different in the case of private corporations. In order that a person may be made or become a member of a private corporation, of whatever character, there must be a valid and completed contract between him and the corporation. No man can be made a member of a private corporation without his consent, express or implied. Thus, a special act purporting to incorporate certain persons, naming them, can only have the effect of incorporating such of the persons named as consent or join in accepting the act."

In *In re Village of North Milwaukee*, 67 N. W. (Wis.) 1033, the legislature attempted to confer on the circuit court the power to create a municipal corporation, and after an elaborate discussion, Mr. Justice Winslow says (1037):

> "The principles we hold in this case are simple: (1) The creation of municipal corporations is the exercise of

legislative power; (2) legislative power cannot be delegated save as authorized by the constitution itself; (3) the circuit court, under the constitution, is purely a judicial court, and is not authorized to receive or exercise legislative powers of any kind; (4) the act of determining, either tentatively or finally, whether it is for the best interest of the people that they should be incorporated into a village, and fixing the boundaries, is not the determination of a mere question of fact, but is the exercise of legislative discretion, and, if such power be delegated at all, it must be delegated to the proper bodies named in the constitution."

In *Territory ex rel. Kelly* v. *Stewart*, 1 Wash. 38, 23 Pac. 805, 8 L. R. A. 106, it is said that:

> "A statute authorizing the creation of a municipal corporation by a judicial court, upon petition of a majority of the inhabitants of the territory to be incorporated, is unconstitutional as delegating legislative functions to the court."

And that case was approved in *Ferguson* v. *Snohomish*, 24 L. R. A. (Wash.) 795, 797.

In *Ellis* v. *Marshall*, 2 Mass. 269, 3 Am. Dec. 49, 51, it is said:

> "That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose, if the legislature deem it proper (referring to a public purpose) is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known that they have power over the person to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of a private enterprise. That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities. That he may decline to improve his land no one will doubt. Although the legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to judge for himself on points of this nature. The fact, therefore, in the case that Marshall is benefited equally with the other owners by the making of this street, is of no importance."

In *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 708, 4 L. Ed. 629, 676, Mr. Justice Story cited *Ellis* v. *Marshall, supra*, saying:

"The attempt certainly is to force upon the corporation a new charter against the will of the corporators. Nothing seems better settled at the common law than the doctrine that the crown cannot force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporation. *Neither can the crown compel a man to become a member of such corporation against his will.*"

In *Glaspell* v. *City of Jamestown*, 88 N. W. (N. D.) 1023, a statutory provision attempting to delegate authority to a court to create a corporation was held unconstitutional and void, Mr. Justice Morgan (1024), using this language:

"In other words, it is undisputed that the delegation of legislative functions to the district courts is not contemplated by the constitution, and that the three departments of government provided for in the constitution are distinct from each other; the powers of each being therein separately defined. It is therein provided that the executive department shall enact, repeal, or amend the laws, and the judicial department shall construe them. It is a fundamental principle of law, and recognized by section 130 of the constitution of this state, that the creation of municipal corporations is a legislative function. Such corporations are created pursuant to legislative enactments only. Dill. Mun. Corp., Sec. 37; Cooley, Const. Lim. (5th Ed.) p. 228. To further their creation in states where special legislation is prohibited, certain acts relative to their creation may be delegated by the lawmakers to be done or performed by local municipal bodies. In these cases it is deemed, nevertheless, that the performance of such acts is not the creation of the corporation. The law does that, and the organization is deemed to be perfected or created by the law upon the performance of such act by the body to which the performance of such act is delegated. *People* v. *Burr*, 13 Cal. 358."

The rational deduction from the cases is that, if the legislature delegate to the district court authority, to declare, by an order, the existence or recognition of a corporation, such order will be the exercise of a legislative authority through the instrumentality of the judiciary, and will have no force as a judicial judgment of the court. It could not create an estoppel nor confer the power of eminent domain on the organization, nor foreclose the right of any person affected by

it to contest the validity of the act. If the legislature could not constitutionally confer the power of eminent domain on such an organization, then clearly the court could not do so. The nature of the power is not changed by the instrumentality by which it is exercised. If the power is legislative but is administered by another department, it is none the less legislative from that fact; and if it is judicial but exercised by another department, it is none the less judicial.

So it is said in 10 *Cyc.* 219:

> "The theory is that in such a case the legislature merely uses the courts for the purpose of giving legal form to the corporation, and that the act required by the statute to be done by the courts is not an act involving even judicial discretion, but is a purely ministerial act in such a sense that its performance could be compelled by mandamus."

And in *Franklin Bridge* v. *Wood*, 14 Ga. 80, it is said:

> "Accordingly it has been held that the legislature may, in the absence of a direct constitutional authorization, provide by law for the creation of village, town, or city corporations, by presenting a petition therefor to the county court, that body having no discretion to refuse the petition when it conforms to the statute, but being required merely to spread it upon its minutes, which done, the corporation becomes *ipso facto* legally organized."

The order of the court simply furnishes evidence of the organization.

> *Greenville, etc., R. Co.* v. *Johnson*, 8 Baxt. (Tenn.) 332.

So whether the legislature could or could not delegate its authority, the order has no greater force than a like order of any other department or agency.

It is elementary that if the legislature could not confer the right of eminent domain on a private corporation organized for a strictly private purpose, and thus enable it to take the private property of others for its own use, the order of the district court could not impart that right.

So we are brought to the question: *Is the organization in question private and created for private purposes, and can it exercise the power of eminent domain?*

The act must be construed strictly against the organization, as it is an unbending rule that a grant of corporate existence is never implied, and that in the construction of a statute every presumption is against it.

*Central Railroad and Banking Company* v. *Georgia*, 92 U. S. 665, 666; 23 L. Ed. 757, 760.

*Memphis R. R. Co.* v. *Berry*, 112 U. S. 609, 623; 28 L. Ed. 837, 840.

*Richmond Railroad* v. *Louisa R. Co.*, 13 How. 71, 81; 14 L. Ed. 55, 60.

*Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 677; 40 L. Ed. 838, 844.

*Louisville & Nashville R. R. Co.* v. *Commonwealth of Kentucky*, 161 U. S. 677, 685, 686; 40 L. Ed. 849, 854.

*Holyoke Water Power Company* v. *Lyman*, 15 Wall. 500, 523; 21 L. Ed. 133, 137.

In *Railroad Company* v. *Commissioners*, 63 Ohio St. 23, the county commissioners, acting under a statute somewhat like the Act involved in this case, ordered the construction of a drainage ditch on the right of way of a railroad company. The commissioners employed an engineer who make a survey, plats, profiles, etc., and recommended the establishment of the ditch. At a hearing before the commissioners the railroad company objected upon the ground, *inter alia*, that the commissioners had no authority to locate the ditch and that it was not a public utility. The objections being overruled the ditch was ordered and the railroad company appealed to the circuit court where the verdict went against it, and the case was taken to the supreme court. The trial judge charged the jury in this language, which was approved by the supreme court (28):

"It is the public health, convenience or welfare of the community to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in the construction of a ditch. Hence, if it is apparent to you that the proposed ditch will be conducive to the public health, convenience or welfare of the neighborhood through which it will pass, the commissioners are authorized to construct the same, and in that case, as to this first proposition your verdict will be for the establishment of the ditch. It is not enough, however, to find that the ditch would be a great convenience, but before you can find in favor of the ditch, you must find that it would be conducive to the public health, convenience or welfare, of the neighborhood through which the ditch passes. The mere fact that the ditch in question might enable the petitioners to raise more corn or other grain, does not authorize you to return a verdict in favor of the establishment of the ditch. *The fact that the ditch in question might enable the petitioner to raise larger crops is a fact going to show that he would be privately benefited, but it requires more than this to authorize you to find a verdict showing that it would be conducive to public health, convenience or welfare, to locate the ditch. The prosperity of each individual conduces, in a certain sense, to the public welfare, but the fact is not sufficient reason for taking other private property to increase the prosperity of individual men. The draining of marshes and ponds may be for the promotion of public health, and so become a public object; but the draining of farms to render them more productive, is not such an object. If you find that the petitioners, and the appellant, * * * are the only persons or corporations in any way interested in the location of the ditch, and that it would not be conducive to public health, convenience or welfare, to locate the ditch in question, then and in that case you should return your verdict against the proposed ditch.*"

In *Railroad Company* v. *Keith, et al.*, 67 Ohio St. 279, a statute provided in substance that if a railroad company neglected to make certain drains and ditches, the probtae court might, after notice, sell the contract for opening the the same, to the lowest bidder. Respecting the nature of the Act the court says, (289):

"The sections in question do not in the least provide for the protection of the public health, convenience or welfare, but are solely for the redress of grievances of pri-

vate persons, the owners of lands contiguous to the railroad. And said sections are so broad that under them railroads might be compelled by the owner or tenant of contiguous lands, to drain off all such accumulations of water, even though not injurious to such lands or the public, and accumulated and stored on the right of way for the use of such railroad. The general assembly has not the power to impose or enforce such a duty. By these sections authority is attempted to be given for the lowest bidder to enter upon the right of way of the railroad, and construct a ditch for the sole benefit of a private individual, without reference to the interests of the public. * * * And all this is done not in the interest of the public, but in the interest of private persons. It is not so much a case in which private property is taken for public use for which compensation must be first made in money, as it is a taking of private property for private use, and therefore in violation of that part of section 19 of the bill of rights which says: 'Private property shall ever be held inviolate, but subservient to the public welfare.' The money required to pay the assessment is the private property of the railroad company and cannot be taken from it for the private welfare of another. * * * (293). The whole object of the statute is to conduct the accumulated water to a proper outlet so as to protect lands contiguous to the railroads, and for the private benefit of the owners of such lands. There is nothing in the statute looking to the protection of the public health, convenience or welfare. So that if the law of nuisance were to be applied to this case, it could not avail, because the nuisance would be to private individuals, and not to the public."

*Donnelly* v. *Decker*, 58 Wis. 467, 46 Am. Rep. 637, 17 N. W. 389, was a ditch case.

The court said (390):

"There is so much conflict and confusion of authorities upon this question, confined to a law of this character and relating to what are supposed to be cognate or analogous objects, that it would be fruitless and profitless to review such authorities, or attempt to reconcile them, or even to make them specially applicable to this case. Most of them relate to street or sidewalk improvements, or sewers in connection with streets, in all of which cases there is a clear and unquestionable *public* use. This

identical question is new in this court. Very many cases have been decided here relating to the opening, grading, or improvement of streets, changing the waters of rivers in connection with the same, and to the building of sidewalks and similar works of internal improvement, which are evidently for the public use, and, of course, fall under the above provisions of the constitution. * * * But the view we take of this case renders it unnecessary to examine further the decisions of this court relating to the taking of private property for public use, and to the rule of uniformity in taxation. * * * Historically, such laws, with even more stringent provisions against the owners of the lands to be drained or reclaimed by the ditching, exist in many of the states, and in some have existed from an early day, and they have generally been upheld. If such an improvement is *really* for the public use and benefit, then it must fall within the principles of eminent domain and taxation, and on this theory the law cannot be sustained. Such drainage laws have sometimes been treated as being within those principles, and have been condemned because they provide for taxation beyond actual benefits, upon an arbitrary and unequal basis. * * * *It is too clear for argument that this law cannot be sustained if it come within the doctrine of these and similar cases, where it is held that private property is taken for public use under the power of eminent domain, and that the excess of the assessment is taxation.* * * * *It requires but a casual examination of these provisions for the draining of the swamp and overflowed lands of the state to be apparent that such ditching and draining are for no public use whatever in the legal meaning of the term. The pecuniary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners, and for their use alone. It enhances their value, intrinsic and in market. This is the only object which concerns their use, and that use is strictly private.* The other object, and the only one mentioned in the law, is that such ditching, draining, and enlargement of drains will 'conduce to the public health or welfare.' It is clear that no private property is authorized by this law to be taken for the public use, and that whether taxation so called or assessment, it is not an exaction of the government for revenue or for any public purpose. *It follows that this system of drainage of the lands of private owners by special assessment of all of them proportionably according to their respective private benefits, is not within the purview of any provision of the*

*state constitution, and it cannot be sustained thereby.* * * * Indeed, it seems marvelous that any court should ever attempt to justify such laws, which are purely and essentially for private purposes, confined to the owners of the lands drained and improved, under the power to condemn and requiring compensation, and to tax for public purposes, or even to make an assessment of actual benefits, as in the case of streets and sidewalks, which are confessedly for public use. * * * The distinction upon which rests the right of legislation in such cases, under the doctrine of eminent domain and the state power of taxation, is whether the objects are *publici juris* or *priviti juris*. Cooley, Const. Lim. 577, note. To compel the owners of lands to make embankments thereon to restrain the overflow of navigable rivers, may, in a sense, partake of the nature of a work for the public use, and in such cases the rules of uniformity in taxation and compensation for the land taken may well apply. But even in such case the police power has often been invoked to justify such works, and especially the duty required by law for each abutting owner to keep up the defenses against inundation. * * * *In order to justify an assessment, the improvement must be for a public purpose, since the public have no right to tax a citizen to make improvements for his own benefit solely.*"

In *Matter of Ryers*, 72 N. Y. 1, a drainage act was construed. In construing the act Mr. Justice Folger said:

"We are not called upon in this case to uphold an act which has for its purpose the benefit of individuals. As before said, it avows, and avows only, a public purpose. No action purporting to be under it, which is shown to have other object than to maintain the public health, can or will be sustained under our present constitution. It may have been different heretofore. * * * And drainage acts of the legislature, not having in view the public health solely, have been recognized and acquiesced in by the courts. *But we wish to be distinctly understood that we sustain this act as constitutional solely, for that it plainly has for its purpose the preservation and promotion of the public health.* We will be jealous of any attempt to swerve the powers given by it to the advantage of individuals. That the public purpose may be sought and attained, and private benefit also found, is not improbable. * * * Therefore, as the act provides for a public purpose, and there is evidence that the power given

by it has been used for that purpose and that there was a necessity therefor, we see no reason why on the point now under consideration we should reverse the order."

In *In re Theresa Drainage District,* 63 N. W. (Wis.) 288, the constitutionality of a drainage law was considered, and the court said:

"It is settled law in this state that private property can be taken *in invitum* for a public use only. For a private use it cannot be taken. * * * It is also settled that to dig ditches or drains across the lands of private owners, under an apparent legislative authority, is a taking of the lands. Mills, Em. Dom. Sec. 30; *Smith* v. *Gould,* 61 Wis. 31, 20 N. W. 369; *Donnelly* v. *Decker,* 58 Wis. 461, 17 N. W. 389. The question presented for decision is whether the digging of the ditches and drains and the construction of the levees and other works contemplated by the statute under consideration is for a public use. The provision of the statute is: 'If it shall appear to the court that the proposed drain or drains, ditch or ditches, levee or levees, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for agricultural, sanitary or mining purposes the court shall appoint commissioners. *There is in the entire statute no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should be either necessary or desirable to promote any public interest, convenience, or welfare.* No doubt, such an improvement may be useful to some, or perhaps many, private owners of land, by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly and remotely, in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. *Donelly* v. *Decker, supra.* Some home or homes might be made more cheerful and more healthful. *But one man's property cannot be taken to make another man's home more cheerful or healthful.* It is only when it will make the homes of the *public* more healthful that any man's property can be taken for 'sanitary purposes.' But it is urged that the term 'sanitary purposes' comprehends and imports the idea of the public health. If so, it might save this statute. * * * It will be seen that the word is of purely abstract meaning. It is utterly devoid of any suggestion of numbers or

of public or private relation. It imports neither. For such purpose it is strictly neutral and impartial. Without some qualifying word, it is inoperative to designate the purpose as a public one, or as in the interest of the public health. It is, no doubt, for the legislature to specify the use and purpose for which it authorizes private property to be appropriated. It should be expressed clearly; for it cannot be enlarged by a doubtful construction, nor be presumed to be larger than the purpose which is expressed. This is not a question of the construction of ambiguous words or terms. But it is an entire failure to express in any form that the taking of property for which it provides is to be for a public use. *So it must be held that it does not provide for a taking for a public use. It could not lawfully provide for a taking for any other than a public use.* It cannot support proceedings for the condemnation of lands as for a public use. It is entirely invalid."

In *Fleming* v. *Hull,* 35 N. W. (Ia.) 673, it is said in the syllabus:

"Acts 20th Gen. Assem. Iowa, c. 188, providing for the laying of drains through property of private owners, *for the benefit of land belonging to other individuals,* is unconstitutional, as its purpose is to take property without 'due process of law,' and also because it provides for taking private property for private use without the owner's consent."

In *McQuillen* v. *Hatton,* 42 Ohio St. 202, 204, the question here presented was considered, and it is said:

"Article 1, section 19 of the constitution provides that, 'private property shall ever be held inviolate, but subservient to the public welfare'; thus placing beyond question, that private property cannot be taken for a mere private use. *McArthur* v. *Kelley,* 5 Ohio, 139; *Shaver* v. *Starrott,* 4 Ohio St. 498; *Reeves* v. *Treasurer Wood Co.,* 8 Ohio St. 345. Two petitioners are sufficient, and one petitioner is all the law requires; and the land through which the ditch is to pass need not be owned by more than two persons, and if owned by one person only the ditch may be made. *Reeves* v. *Treasurer Wood Co.,* 8 Ohio St. 333; *Kent* v. *Perkins,* 36 Ohio St. 639. Whether or not the use for which property is proposed to be taken is a public use, is a question of law, to be settled by the judicial power. *Costar* v. *Tide Water Co.,* 18 N. J. Eq. 55;

*Tyler* v. *Beacher,* 44 Vt. 648; *Parham* v. *Justices,* 9 Ga. 341; *Anderson* v. *Turbeville,* 6 Coldw. 150; *Channel Co.* v. *Railroad,* 51 Cal. 269. The use must be for the *public at large. Memphis Freight Co.* v. *Mayor,* 4 Coldw. 419. The use that will justify the taking of private property by the power of eminent domain, is the use by or for the government, the general public or some portion of it; and *not the use by or for particular individuals, or for the* benefit of certain estates. The use may be limited to the inhabitants of a small locality, *but the benefit must be in common and not to a very few persons or estates. Costar* v. *Tide Water Co., supra; Talbot* v. *Hudson,* 16 Gray 417, 424; *Gilmer* v. *Lime Point,* 18 Cal. 229. The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men. The draining of marshes and ponds may be for the promotion of the public health and so become a public object, *but the draining of farms to render them more productive, is not such an object. Anderson* v. *Kerns Draining Co.,* 14 Ind. 199."

In *In re Schubert,* 114 N. W. (Minn.) 244, 245, it is said:

"It is to be noted that the proceedings may be had under the act (1) when public health may be in danger; (2) or when the drainage would result in the reclamation of waste lands; (3) or *'where the construction of a ditch is a benefit to the lands of the adjoining owner or owners.'* The use of the disjunctive in this connection is significant. It is a necessary and inherent part of the act. Under the express terms of the law the property of adjoining landowners may be taken for a private purpose only, and for no public purpose whatever. The basis of the law, in other words, has no necessary reference to either the preservation of the public health or the reclamation of large tracts of otherwise waste lands. *The law authorizes the taking, against the owner's will, of enough of his lands to make a ditch, or the imposition of a burden on that land to that extent against the owner's will and for the benefit of an adjoining landowner. It is plainly designed to promote individual convenience.* Of necessity, it affects the public only indirectly, as the public may share in the profit of the particular individual. If two adjoining landowners can agree upon such a ditch, the law would enforce a proper contract expressing the meeting of their minds, but it cannot compel one man to *part with any part of his land, nor impose a burden upon it merely for his neighbor's advantage.* It is wholly im-

material whether this is done directly or indirectly, through the general analogy of local improvement assessments. It is elementary and undisputed that 'a legislative act which undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an ordinary decree whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof *for public objects*, and they cannot be successfully prostituted for private purposes. * * * *The legislature cannot, by its mere fiat, make a private use a public use.* It follows that a statute which attempts to authorize the condemnation of private property for other than a public use is void, without reference to any legislative declaration as to the nature of the use.' *Minn., etc.*, v. *Koochiching*, 97 Minn. 429, 107 N. W. 405. It is equally certain that no assessment can be levied for a purely private purpose. An examination of other parts of the same statute has served to emphasize the propriety of the conclusion here reached. Enough, however, has been set forth to show that the law is clearly unconstitutional."

In *Reeves* v. *The Treasurer of Wood County*, 8 Ohio St. 333, certain statutes authorizing township trustees to enter upon lands and construct ditches thereon were held void.

The opinion is by Judge Brinkerhoff who said (346):

"But it is a much more serious subject of inquiry whether this section does not, in effect, authorize the entry upon lands and the construction of drains, when demanded by private interest merely, without reference to the public interest, convenience, or welfare. It seems to us clear that it does. If the trustees had been authorized to locate and provide for the opening of a ditch only in case they found the same to be demanded by, or conducive to, the public health, convenience, or welfare, then their action, under legislative authority, would be but an ordinary and legitimate exercise of the right of eminent domain. But this statute prescribes no such condition—no such rule of official duty or limit to official discretion; and a ditch may be located and opened upon the lands of individual proprietors solely for purposes of private

interest, irrespective of the public welfare, without infringing any provision of this act, either express or implied. Is this an infringement upon the inviolability of private property—a taking of private property for private use? The land occupied by the ditch and its banks is not, it is true, wholly appropriated. The owner may still use the ditch itself for purposes of irrigation, for watering stock, or may perhaps make it serve the purposes of a fence. He may grow timber and shrubbery on its banks. *But his dominion over it—his power of choice, as to the uses to which he will devote it, are materially limited; in short, other parties acquire a permanent easement in it. An easement is property; and to the extent of such easement, it is clear to us, that private property is taken, within the meaning and spirit of the constitutional prohibition.*"

In *Kinnie* v. *Bare*, 36 N. W. (Mich.) 672, 673, 674, a drainage case, it is said:

"*Drain laws which take from the citizen his private property against his will, can be upheld solely upon the ground that such drains are necessary for the public health.* They proceed upon the basis that low, wet, and marshy lands generate malaria, causing sickness and danger to the health and life of the people; that when they are of such character as to injure the health of the community, they become and are public nuisances, which ought to be abated, and the legislature have the right, under the police power inherent in every government, to protect the people from plague and pestilence, and to preserve the public health. *But drainage for the purpose of private advantage, such as improving the quality of the land, or rendering it more productive or fit for cultivation, cannot be justified under the police power. Neither public convenience nor public welfare, independent of considerations of the public health, will justify the legislature in the enactment of laws 'for the construction and maintenance of drains, and the assessment of taxes therefor.'* It is evident that where the public health is *not* affected by the existence of low, swampy land, the *only object to be accomplished by their drainage is the improvement of the land itself.*"

In *Anderson* v. *Hill*, 20 N. W. (Mich.) 549, 556, it is said:

"A law passed to authorize such a proceeding is unconstitutional. It deprives the citizen of his property without due process of law; and it makes no difference that

it was assented to by a majority of legal voters. A person may give his own property to whom he pleases, but he cannot compel his neighbor to part with his property except by due process of law. *People* v. *Salem*, 20 Mich. 452; *Bay City* v. *State Treasurer*, 23 Mich. 499. I do not think the law can be sustained upon the theory advanced by counsel for defendant, that the taxation was for a local purpose, and such purpose meritorious and beneficial to the public. It may be conceded that the straightening and deepening of the channel of the Dowagiac river would be conducive to the public health; that it would be advantageous to the roads leading across the swamp, and very much lessen the expense of keeping such highways in repair. Yet all this does not obviate the constitutional objections to the statute under which this tax was levied, and the remedy for existing evils must be sought in some other direction."

In *Wilcox* v. *Paddock*, 31 N. W. (Mich.) 609, 612, a drainage case, it is said:

"It is strenuously insisted by the counsel for respondent that this act is not a work of internal improvement, but an exercise of the police power of the state to protect the health of the public, and abate a public nuisance arising from the overflow of many acres of lowlands, by the Maple river, in the township specified in the act, which overflow is the source and cause of many dangerous diseases in such townships. Without discussing the power of the state, under its police authority, to enter upon a work of this kind, it is a sufficient answer to this argument that the title of the act expresses no such object, but mentions only the improvement of the channel of the Maple river as its purpose. And the body of the act looks more to the *'reclaiming of the submerged lands,' and the opening, deepening, and widening of the river, than to any other object. True, it speaks of 'improving the sanitary condition of the adjacent lands,' but this is merely an incidental allusion.*"

In *Attorney Genral ex rel. Alexander* v. *McLean*, 109 N. W. (Mich.) 27, 28, it is said:

"It is the settled law of this state that, independent of the consideration of necessity on account of the public health, there is no authority in the legislature to enact laws for the condemnation of private property, and to levy taxes for the construction of drains, and that such legislative action is a provision for the exercise of those

police powers inherent in every government for the protection of the people. The drainage laws of this state are framed and based upon this fundamental proposition. As the basis of every valid proceeding under these laws the drain commissioner must find that the drain *is necessary to the public health. Brady* v. *Hayward,* 114 Mich. 326, 72 N. W. 233; *Kinne* v. *Bare,* 68 Mich. 625, 36 N. W. 672; *Cooley on Const. Limitations,* 510, 595."

In *Gifford Drainage District* v. *Shroer,* 145 Ind. 572, 44 N. E. 636, the court said:

"It has been uniformly held by this court that the reclamation of wet land, and the drainage of ponds and marshes, is of public utility, and is for the benefit of the public health and welfare. * * * So far as the drainage of wet lands will promote the health of the public, it is by virtue of the police power of the state that the authority is exercised to enact such laws. * * **It is settled law in this state that the legislature has no power under the constitution to enact a law authorizing one person to improve his own or the lands of another by draining or otherwise, and compel the persons benefited to pay therefor, unless the public is also benefited thereby.* * * * Unless a general law in this state for the drainage of wet lands makes proper provision for the determination in each proceeding of the question whether the particular ditch or system of drainage will be of public utility, or promote the public health, welfare, and convenience, it will be unconstitutional and void. * * * *Drainage, to benefit the lands for agricultural purposes alone, would be for the purpose of private gain or advantage, and would merely subserve private interests, without reference to those of the public.*"

*In re Tuthill,* 163 N. Y. 133, 49 L. R. A. 781, is interesting and instructive. New York amended her constitution to authorize "the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, * * *" and pursuant thereto the genral assembly enacted a statute authorizing the construction of drains by obtaining from the court an order for that purpose. The question involved was whether the amendment to the state constitution and the

statute were in violation of the 14th amendment of the constitution of the United States, and in holding that they were, Judge Gray, who delivered the opinion, said (138):

> "It is an ancient principle, which entered into our social compact, that the use for which private property may be taken must be a *public* one; whether the taking be by the exercise of the right of eminent domain, or by that of taxation. *The sovereign power is incapable of conferring any right to interfere with private property, except it be needed for public objects.* To take land for any other than a public use; to take it from one citizen and to transfer it to another, even for full compensation, would be to violate the contract by which the land was originally granted by government. * * * The fourteenth amendment of the federal constitution, in prohibiting a state from depriving any person of life, liberty or property, without due process of law, protects the citizen against the taking of his property for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain (*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 158). It is a security against the arbitrary spoliation of property, or any abridgement of the immunities of citizens of the United States. * * * (139). Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at and whether the plan has such an obvious, or recognized, character of public utility, as to justify the exercise of the right of eminent domain, or of the power of taxation, in its favor. I suppose, in that consideration, when some new constitutional provision is in question, regard should be had to order conditions, in the laws and in the decisions of the courts of the state upon the subject, which illustrate some settled policy of the community. That can be understood by reference to the cases which arose under the Mill Acts in the New England states, the irrigation acts in the western states and the drainage statute of New Jersey. (*Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9; *Wurts* v. *Hoagland*, 114 ib. 606; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.) The statutes, in those cases, were justified, either in view of a policy in force prior to the adoption of the state constitutions; or, within a similar principle by long exercise of a legislative power which the state courts had sustained. In *Wurts* v. *Hoagland*, the New Jersey drainage statute discussed was framed in the public interest.

It authorized the board of managers of the geological survey, 'upon the application of at least five owners of separate lots of land, etc.,' to examine the tract and, *if they deemed it for the interest of the public and the landowners affected thereby,* to adopt a system of drainage and to report it to the supreme court of the state, etc. * * * In *Fallbrook Irrigation District* v. *Bradley,* the California irrigation act was upheld, in view of the various enactments, constitutional and legislative, together with the decisions of the state court, that such a use of water was a public one. It was observed that they were not binding upon the court; but, in their light, and under the facts and circumstances surrounding the subject-matter, in regard to which the use was questioned, there could be little difficulty in arriving at the same conclusion as the California court. * * * In this state, prior to the adoption of this constitutional amendment, a general drainage law appeared in the revised statutes; but it was very early declared by this court to be unconstitutional, as authorizing the taking of the property of the owner of the land and transferring it to the applicant for the ditch against the consent of the owner. *(Gilbert* v. *Foote,* not reported, but cited in *White* v. *White,* 5 Barb. at p. 483, in 1849, and referred to in *Matter of Ryers,* 72 N. Y. 1.) It was said of *Gilbert* v. *Foote* by Judge Folger, in *Ryers' Case,* that, 'it is understood that the judgment of this court went mainly upon the ground that the act sought to permit the taking of private property for a private use, which was not a use for a private way.' * * * The opinion of this court in *Ryers' case* proceeded upon the proposition of the right to take private property for public use, making due compensation therefor, and that the maintenance and promotion of the public health were matters of public concern. It was held to be a constitutional power of legislation to provide for removing or abating that which has became a public nuisance, injuring the public health. 'We are not called upon in this case,' Judge Folger observed, 'to uphold an act which has for its purpose the benefit of individuals. As before said, it avows, and avows only, a public purpose. * * * We wish to be distinctly understood, that we sustain this act as constitutional solely, for that it plainly has for its purpose the preservation and promotion of the public health.' * * * It was well within the legislative power to make the state the sole actor and in the interest of a public necessity, or convenience, to authorize such interference by the public

authorities with private rights as would abate conditions prejudicial to the health, or comfort, of the community; or to authorize private persons to take the initiative in the same direction of public utility. In the drainage statute in question in *People ex rel. Cook* v. *Nearing*, 27 N. Y. 306, for instance, the legislature appointed the commissioners to drain the wet and swamp lands of the town of Cicero and directed their procedure. The state was the actor in the matter and thus the presumption of a public purpose or necessity was conclusively furnished. The legislative action was similar in the acts referred to in *Hartwell* v. *Armstrong*, 19 Barb. 166, and in *People ex rel. Parker* v. *Jefferson Co. Court*, 55 N. Y. 604. But, lacking public ends, I find nothing in the past political history of the state which would justify laws, by which a citizen may be authorized to take the property of his neighbor by the exercise of the right of eminent domain, for a purpose which is primarily for his private benefit; although, incidentally, of such possible benefit generally, as any improvement of agricultural lands would result in. Such legislation is not sound in principle and we are not embarrassed by any long acquiescence, or by either judicial or legislative precedents, in so asserting; or in holding that no imperative reasons of public policy warrant the delegation of the power to exercise the right of eminent domain in such cases (142). * * * An amendment of the organic law of the state represents the expression of the dominant popular sentiment upon the subject and in this instance it, undoubtedly, represents a purpose to make that lawful which before was not. The reasoning would be that, if it was unconstitutional and, therefore, unlawful before to authorize the taking of private property for the private purpose of the drainage of agricultural lands, by giving it constitutional warrant, it would become lawful to do so; if, indeed, the plan might not be perforce invested with a public interest. But this result would, and should, not be attained, if the constitutional amendment was in conflict with those provisions of the supreme law of the land, embodied in the federal constitution, which guarantee the citizen against the taking of his life, liberty or property without due process of law. The amendment of our constitution does not, in terms, declare its object to be a public one. Indeed, I think that its language, by a fair reading, rather negatives such an inference and imports that the object is the private benefit of the landowner; for the purpose is stated to be the drainage only of his lands and

he is to make just compensation for the land appropriated to that purpose. I conceive the proper rule of construction to be that, if the amendment expressed a purpose theretofore recognized as public, it would afford that sufficient sanction for subsequent legislation on the subject which might be needed (144). But, if the object had been theretofore deemed not of a public nature, or of public concern, and it touches some personal immunity secured by the law of the land, its presence in the constitution will not have the effect of removing the fundamental objection to it. I do not believe that the people of the state can affect, or impair, the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose, which is essentially of private benefit and which has always been held to be such. When the amendment says that 'general laws may be passed permitting the owners and occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, etc.,' it means that the legislature may authorize any such person to take another's land for a purely private purpose and that is in conflict with the inhibition of the bill of rights and violates the guarantees of the federal constitution. If the citizen invokes the guarantees of the federal constitution for his protection against the enforcement of a law, which an amendment of the state constitution purports to authorize, I perceive no valid reason, if he is right in his claim to protection, that we should not recognize it. I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative. If, however, the amendment in question can be upheld as valid, upon the assumption that it removes a constitutional limitation upon legislation providing for the drainage of agricultural lands and that it can rest for its justification upon a common local necessity, independent of the public health, and concerning the promotion of the prosperity of the community, then it seems clear to me that it affords no warrant for the enactment of this drainage law. The section of the article of the constitution, to which the amendment was added, prescribed the tribunal which shall ascertain the compensation to be made for the private property 'taken for any public use,' and then proceeded to provide for the opening of private roads and that the payment of the amount of the damage to be sustained by their opening and the expense of the proceeding 'shall be paid by the persons to be benefited' (145). * * * The scope and

intendment of the law are that the expense of constructing the drain and the damage for the appropriation of property shall be borne by the petitioners jointly with the owners of the land taken, in proportion to benefits accrued. As we have pointed out, the amendment does not authorize this and the legislature has only that general power with respect to taxation as would justify its exercise for public purposes. Private property may be constitutionally taken for public use by taxation, as it may by right of eminent domain, and the compensation which must be specially made in the latter case, when property is taken, is deemed to be received, when property is taken under the power of taxation, in the protection afforded by government to the life, liberty and property of persons; or in the increase of the value of their possessions by the application of their moneys to the public purpose (146). * * * If the legislature can enforce the construction of a drain at the instance of one person, at the joint cost of himself and of the objecting landowners, the salutary checks imposed upon legislative power for the protection of the citizen become valueless. I quite agree, also, with the views expressed at the appellate division, with respect to the power of taxation conferred by the act. To quote from the language of the opinion: 'Under its provisions the authority to tax may be exercised in favor of a single person for the improvement of a single acre of agricultural land, a result which we feel certain was not within the contemplation of the framers of the constitutional provision.' As this act confers the right to take property in derogation of private rights, it is to be strictly construed. (*People ex rel. More* v. *Jefferson County Court*, 56 Barb. 136.) It has but one object and that is to enforce the construction of the work needed to drain, or to protect, agricultural lands at the joint cost of the petitioner, or petitioners, and of the owners of the lands taken for the purpose. All of its provisions are connected as parts of a single scheme, which, in any view, must fail for the reasons given (147)."

In *Prieve* v. *Wisconsin State Land & Improvement Company*, 33 L. R. A. (Wis.) 645, it is said in the syllabus:

"The state cannot take away or destroy the rights of a riparian owner without his consent and without compensation and without due process of law, for the sole purpose of benefiting some other riparian owner, or for any other mere private purpose."

In 14 *Cyc.* 1025, it is said:

> "Under the various constitutional provisions and acts conferring power upon local authorities to establish drains, it must be shown that such drain is necessary and conducive to public health, convenience, or welfare, or of public benefit or utility."

It is believed that the following cases have a direct bearing on the question:

*People ex rel. Pulman* v. *Henion*, 64 Hun. 471.
*Gilbert* v. *Foote*, cited in 5 Barb. (N. Y.) 474, 483.
*Woodruff* v. *Fisher*, 17 Barb. (N. Y.) 224.
*Chaplain* v. *Wheatland Highway Comrs.*, 129 Ill. 651, 22 N. E. 484.
*Re Drainage in Penfield*, 3 App. Div. (N. Y.) 30.
*Re Draining in Chili*, 5 Hun. 116.
*Chesbrough* v. *Putnam & P. Counties Comrs.*, 37 Ohio St. 508.
*State ex rel. Witte* v. *Curtis*, 56 N. W. (Wis.) 475.

Defendants' counsel admit in their brief (p. 46) that: "The purpose for which property is taken under the right of eminent domain must be a *public* one." And the cases cited by them are in entire accord with our contention.

Thus in *Wilson* v. *Black Bird Creek Marsh Company*, 2 Pet. 245, 252; 7 L. Ed. 412, 414, a jurisdictional question was decided by Mr. Chief Justice Marshall. In speaking of a drainage act of the Delaware legislature, he said (251): "The value of the property on its banks must be enhanced by excluding the water from the marsh, *and the health of the inhabitants probably improved.*"

In *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701-715, 28 L. Ed. 569, 570, 571, a general reclamation act was sustained upon the theory, "that it is in the power of the state to require local improvements to be made which are *essential to the health and prosperity of any community within its borders. To this end* it may provide for the construction of canals for draining marshy and malarious districts * * *."

In *Wurts* v. *Hoagland*, 114 U. S. 606-615, 29 L. Ed. 229, the statute conferred on the board of managers of the geological survey, a department of the state government, authority, on application of five owners of separate lots of land, included in any tract of land in this state which is usually in a low, marshy, boggy or wet condition, to examine the tract, and, if they deem it *for the interest of the public* and of the landowners to be affected thereby, then to make surveys, and decide upon and adopt a system of drainage, and report it to the supreme court of the state. It was held that the case came within the principle of *Head* v. *Amoskeag Manfg. Co.*, 113 U. S. 9, 28 L. Ed. 889. In which case it is said that (28 L. Ed. 894):

> "We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature."

*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112-179, 41 L. Ed. 369, involved the validity of a legislating authority to a county board of supervisors to hear the application of petitioners for the establishment of an irrigation district and it was held valid, because it was for a public purpose. It is said (160):

> "*The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect.* In general, the water to be used must be carried for some distance and over or through private property which cannot be taken in *invitum* if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole* v. *LaGrange*, 113 U. S. 1 (28:896). A private company or corporation without the power to acquire the land in *invitum* would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it

> would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose."

In *Sweet* v. *Rechel*, 140 U. S. 388, 408; 40 L. Ed. 188, 198, a Massachusetts statute authorized a city "to abate a nuisance existing therein, and *for the preservation of the public health* in said city," and it was held valid as promoting a *pubilc* purpose.

In *Chicago, Burlington & Quincy Railroad Co.* v. *The People of the State of Illinois*, 200 U. S. 561-601; 50 L. Ed. 596, the question involved was the right of a city to impose upon the railroad company the expense of the removal and rebuilding of a bridge and culvert made necessary by the widening and deepening of the channel of a creek, to subserve the drainage of low lands. The highway commissioners were *ex officio* drainage commissioners and were authorized, "to make all necessary bridges and culverts along or across any public highway or railroad which shall be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax or by the railroad company as the case may be." It was contended by the railroad company that "to require it to meet these expenses out of its own funds will be within the meaning of the constitution, a taking of its property for a *public* use without compensation and therefore without due process of law, as well as a denial of the equal protection of the laws."

But the court said (585):

> "We assume that the drainage statute in question is entirely consistent with the constitution of Illinois. It is so regarded by the supreme court of the state, and that is all sufficient in this case. We assume, also, without discussion—as from the decisions of the state court, we may properly assume—that the draining of this large body of

lands so as to make them fit for human habitation and cultivation is a public purpose, to accomplish which the state may, by appropriate agencies, exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by 'the subjection of such lands to cultivation, they are made to bear their proper proportionate burden to the support of the inhabitants and the commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased.' 212 Ill. 103, 119, 72 N. E. 219. It is conceded that this public purpose cannot be certainly and effectively attained except through the plan adopted by the drainage commissioners."

In each of these cases the avowed purpose was *public.*

*Mugler* v. *Kansas,* 123 U. S. 623, 31 L. Ed. 205, and *White* v. *VanHorn,* 159 U. S. 3-20, 40 L. Ed. 55-61, cited by defendants' counsel are in no way applicable.

The legislature cannot make a private purpose a public one by mere fiat.

*Dodge* v. *Mission Township,* 107 Fed. 827, 829.

It cannot evade the constitutional limitations of its power to make a private use a public one by simply declaring it to be such.

*Healy Lumber Company* v. *Morris,* 63 L. R. A. 820.
*Denver, etc., R. Co.* v. *U. P. R. Co.,* 34 Fed. 386.

Whether the use is public or private is a judicial question to be determined by the court.

*Matter of Niagara Falls R. Co.,* 108 N. Y. 375, 385.
*The Pocantico Water Works Co.* v. *Bird,* 130 N. Y. 249, 258, 259.
*Logan* v. *Stogsdale,* 8 L. R. A. 58.
*Washington Water Power Company* v. *Waters,* 186 Fed. 572.

By the weight of authority, to constitute a public use it is necessary that the general public be to some extent entitled to control the property appropriated, or to have a right to a fixed

and definite use of it, not as a mere matter of favor or by permission of the owner, but as a matter of right.

*Gaylord* v. *Sanitary District*, 63 L. R. A. 582.

*Minnesota Canal & P. Co.* v. *Koochiching Co.*, 107 N. W. (Minn.) 405, 5 L. R. A. (N. S.) 638, 648.

*Berrien Springs Water Power Co.* v. *Berrien Circuit Judge*, 94 N. W. (Mich.) 379, where it is said (380):

> "Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it. *Ryerson* v. *Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Board of Health* v. *Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114."

*White* v. *Smith*, 43 L. R. A. 498.

A use which may be monopolized or absorbed by a few, and from which the general public may and must alternatively be excluded, is in no sense a public use.

*Board of Health* v. *Van Hoesen*, 14 L. R. A. 114.

If the benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it.

*Pittsburg, etc., R. Co.* v. *Benwood Iron Works*, 2 L. R. A. 680.

Not only must the purpose for which the land is taken be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use.

*Board of Health* v. *VanHoesen*, 49 N. W. 894, 14 L. R. A. 114.

*Kettle River R. Co.* v. *Eastern R. Co.*, 43 N. W. (Minn.) 469, 6 L. R. A. 111.

*In re Burns*, 155 N. Y. 23.

*Pocantico Water Works Co.* v. *Bird*, 130 N. Y. 249.

*In re Niagara Falls R. Co.*, 108 N. Y. 372.

*In re New York, etc. R. Co.*, 99 N. Y. 12, 24.

*In re Eureka Basin Warehouse Co.*, 96 N. Y. 42.

*Bridal Veil Lumber Co.* v. *Johnson*, 34 L. R. A. 368.

*In re Rhode Island Suburban R. Co.*, 52 L. R. A. 879.

In Cooley's Constitutional Limitations, (Ed. 1903), p. 768, it is said:

> "It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."

In *Missouri Pacific Railway Company* v. *Nebraska*, 164 U. S. 403, 417, 417 L. Ed. 489, a legislative act conferring power on the state board of transportation to grant sites for farmers elevtaors on a railroad right of way, was held not to be due process of law within the meaning of the 14th amendment and therefore void.

The court says:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th article of amendment of the constitution of the United States. *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 627, 658 (7:542, 553); *Den, Murray* v. *Hoboken Land & I. Co.*, 59 U. S. 18 How. 272, 276 (15:372, 374); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22:455); *Davidson* v. *New Orleans*, 96 U. S. 907, 102 (24:616, 618); *Cole* v. *LaGrange*, 113 U. S. 1 (28:896); *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 158, 161 *(ante*, 59); *State* v. *Chicago M. & St. P. R. Co.*, 36 Minn. 402."

See *Union Refrigerator Transit Company* v. *Commonwealth of Kentucky*, 199 U. S. 194, 202, 203; 50 L. Ed. 150, 153.

It is clear that the Act looks to a strictly private organization and the declaration that it is public is a mere *brutum fulmen*.

The following legislative acts have been held unconstitutional and void as promoting a private purpose:

*State* v. *Adams County*, 15 Neb. 568, (bonds to aid a steam grist mill); *Getchel* v. *Benton*, 30 Neb. 870, (bonds to aid a beet sigar mill); *Citizens Savings & Loan Asso.* v. *Topeka*, 20 Wall. 655, 670; 20 L. Ed. 455, (bonds of municaplity to pay manufacturing company); *Hanson* v. *Vernon*, 27 Iowa 47, (tax to aid in the construction of a railroad); *Osborn* v. *County of Adams*, 106 U S. 181, 183; 27 L. Ed. 129; S. C. 109 U. S. 1-2; 27 L. Ed. 835, (bonds to aid a steam grist mill); *Weismer* v. *Village of Douglas*, 64 N. Y. 91, (authorizing a municipal corporation to issue bonds to buy stock in a private corporation); *Matter of Eureka Basin Warehouse & Manufacturing Co.*, 96 N. Y. 42, (authorizing a corporation formed for manufacturing, mining, or other chemical purposes to acquire land by eminent domain); *Michigan Sugar Co.* v. *Auditor General*, 83 N. W. 625, (providing for the payment of bonds to sugar beet growres); *Wisconsin Keeley Institute Co.* v. *Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, (to treat habitual drunkards at a private institution); *Baltimore E. S. R.* v. *Spring*, 30 Md. 510, 27 L. R. A. 72, (money for the benefit of an insolvent railroad); *Opinion of Justices*, 155 Mass. 598, 15 L. R. A. 809, (to purchase and distribute fuel to inhabitants of a municipality); *Underwood* v. *Wood*, 93 Ky. 177, 15 L. R. A. 825, (for payment of tuition of pupils to attend private academies); *Re Barre Water Co.*, 62 Vt. 27, 9 L. R. A. 195, (to distribute water power to private consumers); *Bush* v. *Board of Supervisors of Orange County*, 159 N. Y. 212, 45 L. R. A. 556, (to raise money to pay drafted men serving in the Union army or their heirs); *Parkersburg* v. *Brown*, 106 U. S. 487, 491; 1 Sup. Ct. 442, 27 L. Ed. 238, (bonds to aid

manufacturers); *Cole* v. *LaGrange*, 113 U. S. 1, 9; 5 Sup. Ct. 416, 28 L. Ed. 896, (bonds to aid manufacturers); *Dodge* v. *Mission Tp.*, 107 Fed. 827, 832; 46 C. C. A. 661, 54 L. R. A. 242, (bonds to aid manufacturers); *Allen* v. *Inhabitants*, 60 Me. 124, 11 Am. Rep. 185, (bonds to aid manufacturers); *Coates* v. *Campbell*, 37 Minn. 498, 35 N. W. 366, (bonds to aid manufacturers); *Lowell* v. *Boston*, 111 Mass. 454, 14 Am. Rep. 39, (bonds to aid sufferers from Boston fire); *Patty* v. *Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744, (aid to flood sufferers); *Lucas County* v. *State*, 75 Ohio St. 114, 135; 78 N. E. 955, (annuities for the blind); *Wisconsin Keeley Institute Co.* v. *Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep, 105, (bounty to private inebriate hospital); *State* v. *Froehlich*, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985, (bounty to private inebriate hospital); *State* v. *Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653, (bounty to students attending state university); *Kingman* v. *City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123, (aid in erection of building for Grand Army post); *State* v. *Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99, (furnishing seed grain to farmers); *Deering & Co.* v. *Peterson*, 75 Minn. 118, 77 N. W. 568, (appropriation to purchase seed grain for those without crops); *Deal* v. *Mississippi County*, 18 S. W. 24, 107 Mo. 464, 14 L. R. A. 622, (bounties to growers of trees); *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489, (taking of railway right of way for private elevator); *Atchison, T. & S. R. Ry. Co.* v. *Campbell*, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 323, (free tickets to stock shippers); *Harp* v. *Choctaw, O. & G. Ry. Co.*, (C. C.) 118 Fed. 169, (compelling building of spur track to coal mine); *Oxnard Beet Sugar Co.* v. *State of Nebraska*, 73 Neb. 57, 66, 68; 102 N. W. 716, (bounty for growers of sugar beets); *Michigan Sugar Co.* v. *Dix*, 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354, (bounty for growers of sugar beets); *Minnesota Sugar Co.* v. *Iverson*, 91 Minn. 30, 97 N. W. 455, (bounty for growers of sugar beets).

**The Act Violates the 14th Amendment in that it Denies the Equal Protection of the Laws and the Privileges and Immunities of the Plaintiffs and Other Citizens.**

It is settled that the constitutional validity of a statute is to be tested not by what has been done under it, but by what may, by its authority, be done.

*Stuart* v. *Palmer*, 74 N. Y. 183, 188.
*Gillman* v. *Tucker*, 128 N. Y. 190, 200.
*Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160-172; 38 L. Ed. 398, 400.

In urging this point, we have to say, that it seems to be settled that a mere legislative declaration of the purpose of the Act is not binding and cannot conceal its real object.

*Lochner* v. *New York*, 198 U. S. 45-76; 49 L. Ed. 937, 942, 944.
*Webster* v. *Susquehanna Pole Line Company*, 112 Md. 416, 21 Am. & Eng. Ann. Cases 357.
*Salisbury Land & Improvement Co.* v. *Commonwealth of Massachusetts*, 46 L. R. A. 1196, 1201.

The record discloses the absence of notice to the plaintiffs of the application to be made to the county judge for the appointment of appraisers and the hearing thereon and no such notice was ever given or opportunity afforded them (Record, pp. 71-74; fols. 112-118). The first intimation they had of such purpose was when the order of the county judge appointing appraisers was served on them. The application and hearing were strictly *ex parte* and in no sense due process of law, and is in full keeping with the general policy of the Act.

The state court, in *Wilber* v. *Reed*, 84 Neb. 767, expressly ruled that appraisers could not be appointed by a county judge to condemn and appraise a right of way without notice. In that case it was said that such a proceeding was not due process of law and that the statute authorizing it was void (pp. 770-774). The Wilber case is based on *People* v. *Tallman*, 36 Barb. (N. Y.) 222; *City of Brooklyn* v. *Franz*, 33 N. Y. Supp.

869; *Siefert* v. *Brooks,* 34 Wis. 443; *State* v. *City of Fon du Lac,* 42 Wis. 287, which are to the same effect.

Section 12 of the Act in question provides, *inter alia*, that where the parties fail to agree respecting a right of way across the lands sought to be condemned, "the proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and the rights of appeal."

The proceeding to condemn a right of way for a railroad is found in Revised Statutes of 1913, Sec. 20, Art. 3, Chap. 67, p. 1645, in this language:

> "If the owner of any real estate over which such railroad corporation may desire to locate its road, *shall refuse to grant the right of way through his or her premises,* the county judge * * * *shall,* upon the application of either party, *direct the sheriff* * * * *to summon six distinterested freeholders* * * * to be selected by such county judge and not interested in a like question, *unless a smaller number shall be agreed upon by the parties,* whose duty it shall be to carefully inspect and view the real estate, and shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate, and thereafter they shall assess the damages which the owner shall sustain by the appropriation of his or her land * * * and make report in writing to the county judge * * * who, after certifying the same * * * shall transmit the same to the county clerk * * * for record, and said county clerk shall file, record and index the same in the same manner as is provided for the record of deeds in this state. * * * If such corporation shall, at any time before it enters upon said real estate, for the purpose of constructing its road, pay to the county judge for the use of the owner the sum so assessed and returned to him as aforesaid, it shall thereby be authorized to construct and maintain its said road over and across such premises * * *."

The provisions of these statutes materially differ: By section 12 of the Act under consideration *three* appraisers are to be appointed; by section 20, article 3, chapter 67 of the

Revised Statutes of 1913, *six* appraisers are to be chosen; by section 20 it is the duty of the county judge to "direct the sheriff of said county to summon six disinterested freeholders * * * to be selected by the county judge," who are to constitute the board of apraisers. That was not done in this case. Here (Record, p. 74; fols. 117-118), the county judge made the appointment *in the first instance without issuing an order to the sheriff or giving notice to the plaintiffs.* Section 20 of the railway act contemplates notice to the parties in interest of the time and place of the appointment of the appraisers, as it distinctly says that the number shall be six *"unless a smaller number shall be agreed upon by the parties."* But such an opportunity was not afforded the plaintiffs. And this is in harmony with the holding of the Wilber case.

In appointing appraisers, the county judge does not act in a judicial but in an administrative capacity, and the issuance of a summons to the sheriff is an important step in the proceeding.

*Mattheis* v. *Fremont, Elkhorn & Missouri Valley R. Co.*, 53 Neb. 681, 684.

Notice to the plaintiffs of the filing of the application for the appointment of appraisers and of the hearing thereon was an important jurisdictional step and was a privilege that cannot be denied the plaintiffs without a denial of due process of law and of the equal protection of the law. It is well understood, of course, that a person who is deprived of his property by a proceeding which is *coram non judice* is thereby deprived of a privilege under the 14th amendment of the constitution.

Notice is indispensable to due process of law.

*Pennover* v. *Neff*, 95 U. S. 714-748; 24 L. Ed. 565.

When the defendants contemplated taking a right of way over the plaintiffs' lands, the latter were entitled to notice of every step in the proceeding to that end. They should have been notified of the filing of the application for the appointment of appraisers and given an opportunity to appear before

the county judge and object to the competency or qualifications of the persons to be selected. A proceeding which denies notice to a party in interest is never due process of law and is not the equal protection of the laws, and is, therefore, void.

The owner of a public utility is entitled to notice of a proceeding to fix rates.

*Chicago, Minneapolis & St. Paul R. Co.* v. *State of Minnesota,* 134 U. S. 418, 466; 33 L. Ed. 985.

In a word, the Act denies to the plaintiffs and to other citizens and property owners the equal protection of the laws and their rights and privileges and is in violation of due process of law in the following, among other, respects: (1) Because it confers on a "majority in interest" or on the person or corporation owning the greater number of acres in a given territory selected by itself, or himself, the right to create a corporation and bring into it the property of others regardless of their wishes and over their protest, although their holdings may be of greater value than that of the "majority in interest"; (2) because it deprives those owning a minority of the acreage, although of greater value, of an effectual voice in the formation of the district; (3) because it disfranchises all legal electors not land owners living in the territory; (4) because it subordinates the lands of the minority in interest, or those owning the least number of acres, although of greater value, to the domination of a "majority in interest"; (5) because it confers on the "majority in interest" the right to select the officers of the organization, to employ an engineer, and an attorney, to select a drain commissioner and overseers, to issue and sell its bonds and to "assess benefits," the voice of the owners in such case being "one vote for every acre of land owned by him in such district," Sec. 5; (6) because it gives the chairman of the board of directors, or supervisors, the right to bring outlying lands into the district by an adversary proceeding in court regardless of the wishes and over the protest of the owners, and subject them to taxation; (7) because it gives the board of directors, or supervisors, the right to levy a tax

for the use of the district against "other property in said district" whether real or personal, if the board see fit to assess "benefits" against it, and (8) because it denies the right to contest the legality of the organization created under it.

**The Taking of Lot Five of Mr. O'Neill's Land Was in Violation of Due Process of Law.**

There can be no doubt that a flooding of land is a taking within the meaning of the law of eminent domain.

*Pumpelly* v. *Green Bay & Mississippi Canal Co.*, 13 Wall. 166, 182; 20 L. Ed. 557, 561.
*United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539.
*King* v. *United States*, 59 Fed. Rep. 9, 12.
*Williams* v. *United States*, 104 Fed. Rep. 50.
*Nichols on The Power of Eminent Domain*, (Ed. 1909), Sec. 61.
*Manigault* v. *Springs*, 199 U. S. 473, 484; 50 L. Ed. 274, 280.

The defendants do not seriously contend that they condemned lot five north and east of the lake, or the forty acres on which the southwest corner of the lake rests. It is thus described by Mr. O'Neill *(ante,* p. 32): "It is called lot three and *five* of section twenty-eight, township twenty-nine, range eight; there is 153 acres in it." An examination of the record and of the blue print *(ante,* p. 24), discloses that there are about thirty-five acres of lot *five* lying north and east of Jackson lake.

It is proposed to construct a drainage ditch or canal *(ante,* p. 31), to extend from the confluence of Elk and Honey creeks in an easterly direction to the crossing of certain railroads, and "thence in a northeasterly direction to near where the north line of the southwest quarter of the southwest quarter of section twenty-eight, township twenty-nine, range eight intersects the south bank of what is known as Jackson lake" (Record, p. 19; fol. 32).

The undisputed testimony of Mr. Wooley is *(ante,* p. 34), that: "A line running in a northeasterly direction to a point in the southwest quarter of section twenty-eight, township twenty-nine north, could strike this Cut Off lake (or Jackson lake) at any point within 3,000 feet and still be within the southwest quarter of section twenty-eight." And Mr. Smith's testimony is *(ante,* pp. 34, 35), that: "The ditch starts at the confluence of Honey creek with Elk creek with no definite point of starting. It follows the C. B. & Q. R. R. and angles to the north and east without any angle being given or degree of curve and runs in a northeasterly direction somewhere in the section, and it cannot be located by that. * * * I might by taking the scale locate it within 200 feet but not any closer. Yes sir, 200 feet is as near as I can get. Yes sir, a person getting within 200 feet would be very lucky. They could vary more than 200 feet and still be within the require ments of that plat or description."

The fact that only sixty-seven one-hundredths or seven-tenths of an acre of lot five are to be actually taken, for ditch purposes, and that the appraisers allowed $100 for that amount, at which rate the lot would be worth $595, *(ante,* p. 32), conclusively shows that but a small fraction of lot five was taken and that the land is valuable.

There is no serious contention that the water from the ditch will not permanently flood lot five and that it will is practically conceded by the Nebraska court *(O'Neill* v. *Leamer,* 93 Neb. 786, 789), in the use of this language: "If the plaintiffs' lands other than those taken by condemnation proceedings are damaged by this improvement, the law affords them a remedy, including the right of appeal to the court of last resort." Just what remedy the law will afford the plaintiffs is not stated by the court, but we submit that the unbroken rule is that actual compensation must be made, or secured to be made, to the land owner in the manner pointed out in the statute, before the organization will be permitted to enter upon and take the land, and that anything short of that is in violation of the letter and spirit of the 14th amendment.

Thus section 12 of the Act provides that:

> "The district shall not be authorized to enter upon and appropriate any right of way until the damages awarded are paid to the judge of said county court for the use of the parties interested, and if the damages are not so paid within two years from the filing of such commissioners report, all procedings as to the right of way not paid for shall abate at the cost of the district."

There is nothing in the record to show that the damages have been paid, or secured.

The rule in Nebraska is that the damages must be paid, or the payment therof secured, before the property is taken.

*Republican Valley R. Co.* v. *Fink*, 18 Neb. 82, 85, 86.

In that case the court uses this significant language:

> "Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, if you want compensation for this property institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you. Where the assent of the owner is not obtained the corporation must pay the condemnation money before it acquires the right to construct its road across the land of another."

*Hull* v. *C. B. & Q. R. Co.*, 21 Neb. 371, 374.

*Zimmerman* v. *County of Kearney*, 33 Neb. 620, 622.

*Livingston* v. *County Commissioners of Johnson County*, 42 Neb. 277, 280.

*Hodges* v. *Board of Supervisors of Seward Co.*, 49 Neb. 666, 668, 669.

*Lewis* v. *City of Lincoln*, 55 Neb. 1, 4.

*Chicago, B. & Q. R. Co.* v. *Douglas County*, 1 Neb. (Unof.) 247, 250.

*Hogsett* v. *Harlan County*, 4 Neb. (Unof.) 310, 312.

The taking is ordinarily the formal act of some responsible body, consisting of the passing of a vote or the filing of some documents, and the time and extent of the taking are thus definitely fixed; but in the absence of a formal taking, actual

authorized physical interference with the property marks the *punctum temporis.*

> *Nichols on The Power of Eminent Domain,* (Ed. 1909) Sec. 179, p. 206.

That there is no definite line of location, and that the proceedings of the defendants in that behalf are abortive and void is apparent. Admitting that there is such a thing as an "intersection" of streams of water, it cannot be denied that "a northeasterly direction" from where one railroad crosses another, "at or near the south line of the village of Jackson," which is not given, is an extremely indefinite and insufficient description. A "northeasterly direction" is not northeast. It is and may be any point between north and east. "Northeast, is the point between north and east at an equal distance from each" (Webster's Dictionary). "Northeasterly, pertaining to the northeast, *toward* the northeast, or coming from the northeast" (Webster's Dictionary).

Northeast is a point exactly midway between north and east, or 45 degrees from either point of the compass. But there is nothing in the record to show that the proposed ditch, or canal, was to enter Jackson lake northeast of the crossing of the railroads, or from a point "at or near the south line of the village of Jackson." What is a point "at or near the south line of the village of Jackson?" It may be one rod, or ten rods, or fifty rods, or half a mile, and yet be "at or near the south line of the village of Jackson."

The materiality of an accurate description will be apparent on examining the blue print and when it is remembered that if a "northeasterly direction" is any point east of north and north of east, it will take more of Mr. O'Neill's land than would otherwise be taken. This land being highly valuable, it is extremely important to know the exact ground the ditch is to occupy. This defective description is found in all the proceedings, and the proper location being jurisdictional, the appraisement is void.

"The proceedings to create a highway should be so definite and certain that a competent surveyor could, with the record before him, point out its location."

*Warren* v. *Brown,* 31 Neb. 8, 18.

"The land to be appropriated must be identified with as much certainty as is required in a conveyance."

*Rice* v. *Danville L. N. Road Co.,* 37 Ky. (7 Dana) 81; 15 Cyc. 855, 857.

*St. Louis S. & F. R. Co.* v. *Southwestern Telephone & Telegraph Co.,* 121 Fed. 276, 282.

*Matter of Marsh,* 71 N. Y. 317.

*Lyon* v. *Jerome,* 26 Wend. 485.

*Matter of New York, etc. R. Co.,* 70 N. Y. 192.

*Matter of Water Commissioners,* 96 N. Y. 351, 357.

*Bell Telephone Co.* v. *Parker,* 187 N. Y. 299, 303.

The injunction was sustained as to Mrs. Leahy (Record, p. 22; fol. 36), and because her land lies between that of Mr. Heffernan and Mr. O'Neill, it is apparent that in the construction of a ditch the defendants will be compelled to cease work at the east line of Heffernan's land and condemn her land before the work can be completed (See blue print).

We submit, therefore, that the defendants cannot flood lot five and destroy its value without first condemning it and making compensation therefor.

### The State Cannot by the Violation of its Constitution Impart Vitality to the Act and Make it Due Process of Law.

From the landing of the Pilgrims, to the Revolutionary War, the respective colonies maintained a republican form of government, and so of the states and of the nation under the articles of confederation to the time of the adoption of the constitution in September, 1789, when the guaranty became a part of that instrument.

The states which came into the Union thereafter were required to adopt and maintain a republican form of govern-

ment. The duty of the nation to guarantee, and of the state to maintain, such a government is reciprocal. "The guaranty necessarily implies a duty on the part of the states themselves to provide such a government."

*Minor* v. *Happersett*, 21 Wall. 162-178, 22 L. Ed. 627, 631.

Nebraska, like other states, was especially careful to confine the respective departments to their proper sphere of action; and hence, section 1, article 2, provides that: "The powers of government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." There is no other distribution.

The state constitution, therefore, created a representative form of government and by presenting it at the door of congress and seeking and receiving admission to the Union, Nebraska became pledged to the maintenance thereof, and to give to her people the benefit of the republican form of government thus created until such time as she might change it by proper authority; and the general government by accepting the constitution thus presented and admitting the state to the Union, guaranteed to her people a republican form of government.

Abstractly speaking, the necessity of such a government to insure permanency and justice is found in the utterances of Mr. Pinckney, Mr. Butler, Mr. Monroe, Mr. Madison, Colonel Mason, and others in the convention of 1787, frequently referred to in Elliott's Debates, and in the debates of the respective state conventions or legislative bodies by which the constitution was adopted.

The vital necessity for a republican form of government is fully explained in the writings of Montesquieu, Jefferson, Hamilton, Wilson, Goodnow, Chancellor Kent, and others.

Now respecting the binding force of the guaranty on both the state and the nation, it is said by Chief Justice Waite, in *Minor* v. *Happersett*, 21 Wall. 162-178, 22 L. Ed. 627, 631, that:

> "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the constitution."

Chief Justice Fuller, in *Duncan* v. *McCall*, 139 U. S. 449-462, 35 L. Ed. 219, 224, says:

> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, *and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.*"

Thus it is seen that the duty is reciprocal. The state must maintain a republican form of government, acceptable to the nation and just and equitable to her people, who are at the same time citizens of the United States, and the nation must guarantee to the people of the states, because the people are the state, a continuance of that, or of some other republican form that will be just and acceptable to them.

The people of Nebraska having adopted a constitution which distributes the powers of the state to three separate departments and prohibits to each the exercise of the duties properly belonging to the others, a citizen of the state whose property interests are involved and invaded, has a right to the observance thereof and to the safeguards and protection it affords him when properly interpreted and applied, and the state cannot, directly or through any agencies, violate its provisions to his injury.

This court has held that legislative power cannot be delegated to, or exercised by the judiciary. *Heyburn's Case*, 2 Dall. 409, 1 L. Ed. 436; *United States* v. *Ferriera*, 13 How. 40, 14 L. Ed. 42; *Kilbourn* v. *Thompson*, 13 Otto 168-205, 26 L. Ed. 377, 378; *Interstate Commerce* v. *Brimson*, 154 U. S. 447-490, 38 L. Ed. 1047, 1058, 1059; *Gordon* v. *United States*, 2 Wall. 563, 17 L. Ed. 921. And such is the holding of the Nebraska court in *State* v. *Neble*, 82 Neb. 267.

Respecting the right of a citizen of a state, whose property is sought to be taken or injured by the state or by any of its agencies violating the fundamental law, this court said, in *Phoenix Ins. Co.* v. *Gardner*, 11 Wall. 204-210, 20 L. Ed. 112, 114, that:

> "Now, we have repeatedly held that the construction of state statutes belongs to the state courts, and is not a federal question which we can revise in a writ of error to a state court. *It is true, if the state court gives such a construction to a state statute as to make it conflict with the constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said constitution or laws, then a federal question is raised, and we can review the decision on the point of the validity of the statute.*"

And Mr. Justice Clifford said, in *Hall* v. *De Cuir*, 95 U. S. 485-517, 24 L. Ed. 547, 552:

> "Where a state court gives such a construction to a state statute as to make it conflict with the constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives

> a party of his rights under the said constitution or law, it is settled law that a federal question does arise in such a case, and that this court can review the decision of the state court as to the validity of such a statute. *Ins. Co.* v. *Treasurer*, 11 Wall. 204. Were it not so, it is clear that the constitutional provision could always be evaded by the state courts giving such a construction to the contract or the statute as to render the appellate power of this court of no avail in such cases to uphold the contract against unfriendly state legislation. *Delmas* v. *Ins. Co.*, 14 Wall. 661."

And Mr. Justice Miller said, in *Delmas* v. *Merchant's Mutual Ins. Co.*, 14 Wall. 661-670, 20 L. Ed. 757, 759:

> "It may be said that since we know that the supreme court of Louisiana has in other cases held this class of contracts void in their inception, for the very reasons for which the constitution annuls them, we are bound to follow the state courts in that decision. *But, as we have already said, this is not the class of questions in which we are bound to follow the state courts.* It is not based on a statute of the state, or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, *but on those principles of public policy designed for the protection of the state or the public, of which we must judge for ourselves, as they do when the question is fairly presented.*"

The Nebraska constitution contains this language: "No person shall be deprived of life, liberty, or property without due process of law" (Sec. 3, Art. 1), and "the property of no person shall be taken or damaged for public use without just compensation therefor" (Sec. 21, Art. 1). These are taken from the 5th and 14th amendments.

What constitutes due process of law cannot mean one thing under the constitution of a state and another thing in the federal constitution. If this were true there being forty-eight states in the Union, there could be forty-eight different shades of meaning of the phrase, in force at the same time; and if this honorable court were powerless to correct the state court in its definition and application of due process of law, the 14th amendment would be a dead letter.

Due process of law is a phrase that has had a fixed meaning in the history of English jurisprudence since the days of Magna Charta, and this court has so repeatedly held, in the cases we have cited, and in other cases, that it has jurisdiction and that it is its duty, regardless of the opinion of the state court, to determine what constitutes due process of law in a given case and to protect the citizen, where a state, through any agency fails to do so, that it would be a work of supererogation to undertake to collate and cite them.

If, therefore, the Nebraska legislature, by the Act in question, attempted to delegate power to the district court to create a corporation by "order" or "decree" and, by that instrumentality to coerce reluctant citizens into a relation they refuse to voluntarily assume, to the injury of their estate, and burden them with taxation and thus reach and subject their property to burdensome and perpetual easements, then it is clearly within the power of this honorable court to correct the error and to say, that, while the state has a right to change her organic law to some other republican form in conformity to a recognized and orderly method, *she has no right to misconstrue, warp, or dislocate the provisions of her constitution to the injury of her people,* who are at the same time citizens of the United States and stand, as it were, protected by two flags.

And this contention is no wise in conflict with the holdings of this honorable court in, *Luther* v. *Borden*, 1 How. 1, 12 L. Ed. 581; *Kiernan* v. *Portland*, 223 U. S. 151, 56 L. Ed. 386; *Pacific States Telephone and Telegraph Co.* v. *Oregon*, 223 U. S. 118, 56 L. Ed. 377, and *Marshall* v. *Dye*, decided December 1, 1913.

Each of these cases involved the right of a state to change its organic law in some respect, preserving, however, the fundamental idea of a republican form of government. The Luther case simply recognizes the superior right of the political government and of the courts to acknowledge it. The other cases have reference to agrarian changes in state consti-

tutions, but not visibly, or in any manner affecting the established and fixed rights of citizens. In none of these cases were the fixed rights of a citizen involved, or the question of the evasion or violation of a fixed and settled constitutional provision whereby a citizen of the state, and of the United States, was injured in his property considered.

We insist, therefore, that Nebraska cannot, by the enactment of such a statute, confer upon the district court power to create a corporate organization and give it a legal status that it would not otherwise have and so, through that instrumentality, force reluctant citizens into an organization they refused to enter, and confer a power upon such organization thus created it would not otherwise possess.

Under the general incorporation act of Nebraska, which provides that a corporation may be created for any "lawful purpose" (Revised Statutes 1913, Sec. 17, Art. 2, Chap. 14, p. 217), or under the provisions of article 1, chapter 19, page 486, Revised Statutes 1913, entitled "Drainage by County Authorities," or under the provisions of article 2, chapter 19, page 596, Revised Statutes 1913, entitled "Drainage by Incorporated Companies," the petitioners for this organization could have formed a drainage district to drain lands, if they deemed that advisable. But a corporation thus formed would not satisfy the ambitions of the defendants and their associates because the coercive force, or power, over the person and property of others would be lacking. It was, therefore, necessary, to obtain this coercive power, to induce the legislature to pass the Act in question that has back of it the apparent force of the order or decree of a court.

Now, if the power conferred upon the court is intended to be judicial and its order or decree to have the force of a judgment, then the legislature violated the provisions of the state constitution to the injury of the property of her citizens, and this court, under the rule recognized in *Phoenix Ins. Co.* v. *Gardner, Hall* v. *De Cuir,* and *Delmas* v. *Merchant's Mutual Ins. Co., supra,* will correct that abuse.

If, however, the district court was simply an administrative agent of the state government in *recognizing* the existence of a corporation, then its order or decree will have no greater force than articles of association formally entered into and filed with the secretary of state, as such articles must be filed, or the filing of the transcript of its order or decree would have.

Our contention at this point is, that the Act in question was sinister and had in view the organization of a private corporation for the improvement of private property without a semblance of a public purpose, and that the judicial features of the Act were invoked for the purpose of tying the hands and closing the mouths of those who might protest against it, and the state court misconstrued the state constitution to the injury of the plaintiffs and of others in interest.

V.

## A DE FACTO CORPORATION CANNOT EXERCISE THE RIGHT OF EMINENT DOMAIN.

The existence of an organization which is at the same time a *de jure* and a *de facto* corporation is inconceivable. It may be one or the other, but it cannot be both. If *de jure* it is a legal organization. If *de facto*, it acquires its *status* by user, and here there was no user. The claim that it is *de facto* is an admission that it is not *de jure*.

> "A *de facto* corporation is an apparent corporate organization asserted to be a corporation by its members and actually existing as such, but lacking the creative fiat of the state. It is a fact, and not a mere figment of the legal imagination. * * * While the decisions are not entirely clear, it is evident that three things must exist before there can be a corporation *de facto*.. 1. Capacity to become a corporation *de jure*. *There must be at the time of its organization a valid law under which a corporation with the powers assumed might lawfully be created.* 2. A good faith attempt to form a corporation

under such a statute; and, 3. User of the powers and franchises claimed by the organization."

Elliott on Private Corporations, (4 Ed.) Sec. 72, pp. 77, 78.

A *de facto* corporation cannot result from an attempt to organize under an unconstitutional law.

*Mandeville v. Courtwright,* 126 Fed. 1007.

In this case there was no user, and, therefore, there could not be a *de facto* corporation. Here the defendants pleaded a *de jure* existence, but did not claim, in their answer, to be a *de facto* corporation, nor was any evidence to that effect introduced. (Record, pp. 10-14, fols. 16-22.)

To enable it to exercise the right of eminent domain, a corporation must be a *de jure* organization, as a *de facto* corporation has no authority to exercise that right.

*Matter of New York Cable Co. v. Mayor, etc., of the City of New York,* 104 N. Y. 1, 43.

*Tulare Irrigation District v. Shepard,* 185 U. S. 1, 26, 46 L. Ed. 773, 781.

"The doctrine that the right of a corporation *de facto* to exercise corporate powers cannot be collaterally questioned applies only to the right to be and act as a corporation, and *does not prevent a person from showing that a corporation has no right to exercise other franchises than that of being a corporation, not because it is not a corporation capable of exercising such franchises, but because the right to exercise them is for some reason not vested in it.*"

Marshall on Corporations, (Ed. 1902) Sec. 38, p. 121.

Mr. Justice Peckham, in *Tulare Irrigation District v. Shepard, supra,* makes it plain that a *de facto* corporation cannot exercise the right of eminent domain, and that a person whose property is to be affected by it may challenge its legal existence, where he says (17):

"The case of *New York Cable Co. v. New York,* 104 N. Y. 1, 43, 10 N. E. 332, is cited to the point that where it is sought to take the property of an individual under

powers granted by the state to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted be strictly pursued and all the prescribed conditions performed, and that, hence, if the corporation be simply a *de facto*, and not a *de jure*, corporation, it cannot take private property *in invitum*. *The case simply asserts the principle that the right of eminent domain cannot be exercised by a corporation de facto, and that the question of valid organization could be raised when such a corporation sought to condemn lands* That is one of the exceptions to the general rule in regard to a corporation *de facto*. *When a corporation seeks to divest title to private property and to take it for the purposes of its corporation, it must then show that it is a corporation de jure, for the law has only given the right to take private property to that kind of a corporation.*"

## VI

## THIS CASE PRESENTS A DIRECT ATTACK ON THE CONSTITUTIONALITY OF THE ACT IN QUESTION.

There is a singular concatenation of studied and drastic provisions in this maladroit act inserted to prevent any person whose property may be involved, from questioning the right of an organization to be created by it to take his property for its private use and benefit. This hostility to the right of private property is breathed in almost every line, and in the opinion of *O'Neill v. Leamer*, 93 Neb. 786, which is also in hostility to the right of the plaintiffs. Thus it is there said (789): "If the plaintiffs' lands, other than those taken by the condemnation proceedings, are damaged by this improvement, the law affords them a remedy, including the right of appeal to the court of last resort." This statement is incorrect, as the Act makes no provision for an appeal, but says (Sec. 12): "Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and

the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this Act."

The statute referred to, (Sec. 97, Chap. 16, Compiled Statutes, 1909, pp. 580, 581) authorizing the condemnation of a railroad right of way, is confined to the *assessment of damages* to the property owner and gives him no right to attack the validity of the Act, as it is there said: "That either party may have the right to appeal from such *assessment of damages* to the district court of the county in which such lands are situated within sixty days after such assessment." No provision is made for questioning the validity of the Act. The person whose property is to be taken, so far as this Act is concerned, must content himself with receiving such damage as may be awarded by the commissioners, or by a jury on appeal, and the amount of damages is the only question the district court can consider, or that can be presented on appeal to the state supreme court. But, fortunately by the constitution, the district court is invested with general *chancery* power, which, of course, includes the right to entertain jurisdiction of all appropriate *chancery* proceedings to contest the validity of the Act and of the proceedings thereunder.

The constitutionality of the Act could not be presented by *certiorari* as that writ is abolished in Nebraska (Revised Statutes, 1913, Sec. 643, Code of Civil Procedure), and even if it were not, *certiorari* would bring before the court only the *face* of the record for review.

It is evident, therefore, that a person having no interest in the creation of the organization, could not appeal from the district court declaring it to be a corporation, as his right to question it would not arise until his property was sought to be taken.

The statement in *O'Neill v. Leamer,* 93 Neb. 786, 791, that: "The county court had power to correct any irregularities in the method of appraisement," is an error, as it is held, in *Mattheis v. Fremont, Elkhorn & Missouri Valley R. Co.,* 53 Neb. 681, 684, that: "The power conferred by the act upon the

county judge and the duties required of him by that act are not judicial powers or duties, but purely ministerial powers and duties."

As the award of the appraisers is not a judgment, but, like the duties of the county judge, is the administrative, an appeal therefrom could not be taken.

*Tyson v. Washington County*, 78 Neb. 211, 213, 220.

Now, the valuable lands of the plaintiffs, over which a right of way is sought to be taken, in this case, by the defendants, are not in the so-called district; the plaintiffs do not reside therein, nor do they own property of any kind therein, and they were not concerned in, and had no standing entitling them to contest, the right of the organization until an attempt was made to take their property. Indeed, if they had at any time appeared and filed objections to the jurisdiction of the court in that proceeding, they would have been sent incontinently from the court room because of a lack of pecuniary interest in, or privity with, the subject-matter.

It was only, therefore, when the organization thus "created" attempted to exercise the right of eminent domain by condemning and taking a right of way over their property and thus creating burdensome easements thereon, that the plaintiffs were invested with the right to contest the legal existence of the district and the constitutionality of the Act, and this right the Act specifically preserves to them in this language of section 35: "Nor shall any person be permitted to take advantage of any error, defect, or informality *unless the person complaining thereof is directly affected thereby.*" There is no doubt that the plaintiffs are "directly affected thereby," and that they have a right to contest the validity of the Act and of the proceedings thereunder, insofar as they affect them and their lands.

If the Act is in violation of the 14th Amendment, as we think it is, then it must fall, and all things built upon it must fall with it.

If this organization and its right to enter upon and take the plaintiffs' lands cannot be questioned, or attacked in this case, as counsel for defendants seem to contend, in what other way can the plaintiffs invoke the jurisdiction of a court to stop the invasion of their property and prohibit the irreparable injury which follows therefrom?

The opinion of the Nebraska court says (790): "When the remedy at law is adequate, the prosecution of the work cannot be delayed by injunction"; and the writer thereof seeks to avoid the attack by declaring that the illegality of the organization (788), "cannot be insisted upon in this collateral proceeding."

It is evident that if an appeal from the assessment of damages is inadequate, and the plaintiffs cannot reach the constitutionality of the Act in any other way, a suit in chancery to prevent the defendants from entering upon and taking their lands, and to declare the proceedings illegal is the proper remedy, and it is equally clear that the attack is direct and not collateral. And this seems to have been in the mind of the author of the Act when using the language above quoted.

*Walker v. Goldsmith*, 12 Pac. 437.
*Crawford v. McDonald*, 33 S. W. (Tex.) 325.
*Smith v. Morrill*, 55 Pac. 824.
*Morse v. Pickler*, 134 N. W. (S. D.) 809.
*Meyer v. Perkins*, 89 Neb. 59.
*Walker v. Anderson*, 90 Neb. 119.
*German National Bank v. Kautter*, 55 Neb. 103, 111, 112.
*Omaha National Bank v. Robinson*, 73 Neb. 351, 353.
*Eavrs v. Nason*, 54 Neb. 143, 149.
*Topliff v. Richardson*, 76 Neb. 114, 116.
*Payne v. Anderson*, 80 Neb. 216, 220-223.
*Wagner v. Lincoln County*, 80 Neb. 473, 474.
*Kerr v. McCreary*, 84 Neb. 315, 318, 319.
*Radil v. Sawyer*, 85 Neb. 235, 238.
*Humphrey v. Rays*, 85 Neb. 239, 242.

We affirm that the Act has for its sole purpose the creation of a corporation that is strictly private and for a private purpose, to-wit: the improvement of the lands of the corporators, that it has no public purpose whatever, and that a few persons cannot organize a corporation having no public functions to perform and invest it with the power of eminent domain. If the corporators are the public within the meaning of the constitution, these persons, like the tailors of Toole Street have nothing to do but to come together and declare themselves the public and impose such burdens as they may see fit to impose upon the property of their neighbors.

It is respectfully submitted, therefore, that the motion of the defendants to dismiss and affirm ought to be denied, and that the judgment of the supreme court of Nebraska ought to be reversed.

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## EXHIBIT "A".

### Chapter 161, Laws of 1905, as Amended by Chapter 147, Laws of 1909.

* * * *

Section 1. (DRAINAGE DISTRICT—ARTICLES OF ASSOCIATION —CONTENTS.) (As amended.) A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than one hundred and sixty acres, the names and place of residence of the owners of the land in said district, and the description of the several tracts or parcels of land in said district, and also the name or names and the description of the real estate owned by such as do not join in the organization of said district, but who will be benefited thereby, and such owners of real estate as are unknown may be set out in such articles as such, and said articles shall further state that the owners of real estate so forming said district for said purpose are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drainage of the said lands so formed into a district, as provided by law, and after said articles of association shall be signed, the same, shall be filed in the office of the clerk of the district court of the county in which such drainage district is located, or, if such drainage district is composed of tracts or parcels of land in two or more different counties, then in the office of the clerk of the district court of the county in which the greater portion of said proposed drainage district may be situated, praying that they may be declared a drainage district under this article.

Section 2. (SERVICE OF PROCESS.) Immediately after such articles of association shall have been filed, the clerk of the district court of the county in which the proposed district is located, and in case the drainage district be composed of territory situated in different counties, the clerk of the district court of the county in which the greater portion of the land and of the proposed district shall be situated, shall issue a summons as now provided by law, returnable at the next term of the district court directed to the several owners of real estate in said proposed district who may be averred to be benefited thereby, but have not signed, said articles of association, which shall be served as summons in civil cases, and in case any owner or owners of real estate in said proposed district are unknown, or are non-residents, they shall be notified in the same manner as non-resident defendants are now by law notified in actions in the district courts of this state, setting forth in said notice that the articles of association, as aforesaid have been filed, and the purpose thereof, and that the real estate of such owner or owners situated in said district, fully describing the same, will be affected thereby, and rendered liable to taxation or assessment, for the purpose of draining said district, and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same.

Section 3. (OBJECTIONS—HEARING—JUDGMENT.) All owners of real estate in said district who have not signed said articles of association and who may object to the organization of said drainage district, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection, or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in said drainage district, and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case such

objections are overruled, the district court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for.

Section 4. (FILING ARTICLES.) Within twenty days after the said district has been declared a corporation by the court the clerk thereof shall transmit to the secretary of state a certified copy of the record relating thereto, and the same shall be filed in his office in the same manner as articles of incorporation are now required to be filed under the general law concerning corporations. A copy of said record, together with a plat of the district shall also be filed in the office of the county clerk of the county, or counties, in which said district, or any part thereof, is situated.

Section 5. (BOARD OF SUPERVISORS—REPRESENTATION.) Within thirty days after the said district court shall have declared any drainage district organized, the clerk of said court shall upon fifteen days notice, call a meeting of the owners of said real estate situate in said district at a day and hour specified, in some public place in the county in which said district was organized, for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district and resident of the county, or counties in which such district is situated; the land owners, when assembled, shall organize by the election of a chairman and secretary of the meeting, who shall conduct the election; and at such election each and every acre of land shall represent one share, and each owner shall

be entitled to one vote for every acre of land owned by him in such district, and the five persons receiving the highest number of votes shall be declared elected as supervisors; and they shall immediately by lot determine their terms of office, which shall be respectively, one, two, three, four and five years, and until their successors are elected and qualified.

Section 6. (ELECTIONS—TERM OF OFFICE.) Every year after the election of the first board of supervisors, at such time and place in the county in which said district was organized as the board of supervisors may designate, and upon not less than fifteen days notice, unless waived in writing, which notice may be given by personal service, or by sending the same by registered mail to the last known address of each owner of land in such district, such owners shall meet and elect one supervisor therefor in like manner as in the preceding section, who shall hold his office for five years and until his successor is elected and qualified; and in case of a vacancy until the next annual election when a successor shall be elected for the unexpired term.

Section 7. (OATH OF OFFICE.) Each supervisor, before entering upon his official duties as such, shall take and subscribe an oath before some officer authorized by law to administer oaths, that he will honestly, faithfully, and impartially demean himself in office as supervisor of the various districts in which he was elected and that he will not neglect any of the duties imposed upon him by law.

Section 8. (OFFICERS — REPORT — COMPENSATION.) (As amended.) The board of supervisors shall, immediately after their election, choose one of their number chairman, and another secretary. Said board may adopt a seal, with a suitable device, and shall keep a record of all its proceedings, open to the inspection of all owners of real estate in the drainage district. At each annual meeting the board shall make a report of what work has been done, and shall annually publish a statement of its receipts and expenditures, in a legal newspaper, printed, published and of general circulation in the

county in which said district was organized. Such board of supervisors shall receive $2.00 per day compensation for time actually employed in the business of said district, not exceeding eighty ($80.00) dollars each per year, but reasonable allowance shall be made for necessary clerical work, and assistance, and the secretary shall receive for his services such compensation as the board of supervisors may agree upon, payable out of the district drainage fund. The board of supervisors may employ an attorney to act for the district and to advise said board.

Section 9. (SURVEY—ESTIMATE.) (As amended.) The board of supervisors of any drainage district organized as aforesaid shall cause a topographical survey to be made of the district by some competent engineer. The said engineer shall make a complete topographical survey of the said district and submit the same to the board of supervisors with maps and profiles of said survey and a full and complete plan for draining, reclaiming, and protecting the lands in said district from the overflow of or drainage by water, or floods:—and also the physical characteristics and location of any right of way, road bed, bridge or bridges and other property or improvements in said district belonging to or under the control of any railroad company; and shall also report the location of any and all public highways, which may be crossed by the right of way of any ditch, levy or other improvement planned for said district. The said engineer shall also make an estimate of the cost of the entire drainage works and improvements required in said district to protect and reclaim said lands and property, showing the several items of the same. The said engineer shall go over and inspect and examine the lands in said district, the railroad rights of way, road beds, bridges, culverts, depot grounds, grades, and all other railroad, telephone and telegraph property in said district and shall also inspect and examine all other improvements, streets, highways, and bridges belonging to any county, municipal or other corporation and which may be affected by the proposed drainage and reclama-

tion works and improvements, and shall also examine the streams, water courses, ditches, ponds, lakes, and bayous within the district or which may be partly within and partly without said district. He shall assess, as hereinafter directed and according to the rules hereinafter prescribed the amount of benefits which will accrue to each tract or parcel of land and corporate property above named, by virtue of the works and improvements of said drainage district. Each tract or parcel of land, rights of way, and railroad bed, bridges, culverts and depots within the district shall bear its share of the entire cost and expenses incurred by said district in making said works and improvements in proportion to the benefits assessed whether such improvements be made on the tract or parcel of land, rights of way, or railroad bed or not. The engineer in estimating the benefits to lands, streets, highways, railroad property, rights of way, railroad road beds, not traversed by such works and improvements, shall not consider what benefits will be derived by said lands after other ditches, improvements, or drainage plans shall be constructed, but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage or an outlet for drainage, or protection from overflow or damage by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water. The benefits to public streets and highways, railroad property, right of way, and road bed, shall be assessed according to the increased efficiency and value added thereto by reason of and the protection derived from the aforesaid drainage works and improvements. Said engineer shall also classify said lots, tracts, lands, and other property according to the benefit that each may receive from said drainage improvement. The lots, tracts and lands receiving the greatest percentage of benefits shall be classified at 100, those receiving a less percentage of

benefit at such less number as its benefit may determine. The property of public and private corporations may be classified in a list by themselves, each according to the relation its total benefit bears to the total benefit in the district. The maps herein provided for shall be drawn upon a scale sufficiently large to represent all of the meanderings of the proposed improvements, and shall show the boundary lines of each lot, or tract of land, and of each street, road, or railroad to be benefited thereby, the name of the owner of each lot or tract of land, as it then appeared on the deed records, the authority or company having in charge or controlling each public or corporate street, road or railroad, the distance in feet through each tract or parcel of land, the acreage thereof and such other matters as the surveyor or engineer deems material. The profile shall show the surface, the grade lines, gradients, fixed and working sections and said report shall be filed with the board of supervisors of said district within sixty days after making said survey.

Section 10. (DRAIN COMMISSIONER.) The board of supervisors of any district organized under this law shall appoint some competent person to award all contracts contemplated in this article to the lowest bidder, subject to the approval of the board of supervisors, except as herein otherwise provided, to be known as the drain commissioner. He shall hold his office for one year and until his successor is appointed and qualified. He shall have a general superintendence of all works put under contract by said district, subject to the supervision and control of said board of supervisors, and shall report the same when completed according to the terms and stipulations of the contract, and certify the same to the board of supervisors who shall review and accept or reject the work so completed. Said drain commissioner shall, before entering upon the discharge of his duties, enter into bond with proper surety, subject to the approval of the board of supervisors, in any sum not less than two thousand dollars, nor more than ten thousand dollars, to the drainage district of which he shall

be appointed drain commissioner, conditioned that he will faithfully and honestly perform all of the duties required of him by law, and deliver to his successor in office all instruments, papers, and documents that may have come to his hands by virtue of his office as said drain commissioner, and shall take and subscribe the oath required by section seven of this act, which shall be endorsed upon his bond, and filed in the office of the county clerk of the county in which said district, or the greater part thereof, shall be situated.

Section 11. (OTHER LANDS BENEFITED—PROCEDURE.) If, upon the filing of the report of said engineer, together with his estimates as hereinbefore provided, it shall appear that lands, other than those incorporated by the court in said district will be benefited by the drainage improvements of said district it shall be the duty of the chairman of said board of supervisors to file a petition in the district court of the county where said district was originally organized containing a description of said lands, the name or names of the owners as they appear on the tax duplicate of the county in which the lands are situated and their place or places of residence, and alleging that said land will be benefited by the improvements and ought in justice bear its proportion of the expense and cost of such improvement, and that said lands was not incorporated within the limits of the said drainage district as originally established by said court, and if the names of the owners of any such tract or tracts of lands are unknown, this fact shall be stated and praying that said tract or tracts of land may be incorporated and made a part of said district. Upon the filing of said petition duly verified as herein provided the clerk of the district court of said county shall issue summons or notice to the parties interested as provided by section 2 of this act with reference to the original petition for the establishment of said district, and the same proceedings shall be had upon said petition and in said court as upon the original petition for the establishment of said district and the same provisions of law shall apply thereto insofar as the same are applicable; pro-

cided, however, that upon the return day of said notice or summons or at any other time to which said court shall adjourn said cause the court shall have jurisdiction to try and determine said matter at chambers and to make all necessary orders, judgments and decrees; provided, further, that the owners of said lands may by writing duly verified, waive the issuance and service of all notice or process and consent that the court may at once upon the filing of said petition waiver enter the necessary decree. Upon filing said petition in said court it shall be the duty of the clerk to docket said cause, as a proceeding in and part of the original cause for the establishment of said district. After the entering of the decree of said court as aforesaid the land and all of the parties so brought into said district shall be subject to the same provisions of law as would have applied to them had they been incorporated in the original petition and decree entered thereon; provided further, that no land shall be included in said drainage district or subject to taxation for said drainage except wet, submerged and swamp lands or land within a district subject to overflow.

Section 12. (CONDEMNATION OF RIGHT OF WAY.) When said board of supervisors by order entered on record, have agreed upon a location or route for said ditch or ditches and formulated a plan for the other improvements contemplated, then they, in behalf of such district, shall have the right to acquire and if need be condemn any real estate, easements or franchise, whether the same be within the limits of such district or outside its boundaries, that may be necessary for a right of way over or upon which to construct and maintain the ditches, dykes, drains, and other works contemplated by any of the provisions of this act, and when the board of supervisors are unable to agree with the owners of any such property as to the acquisition of such right of way, or if the owners are not residents of the county, or cannot be found, or are minors or persons of unsound mind, or incapable of making a legal contract, the board of supervisors when other means are not

specifically provided, may present to the judge of the county court of the county in which said land, easements or franchise are situated, a petition setting forth the location and character of the right of way needed and describing the lands to be crossed, the size of the ditches, levees, dykes and other works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of three appraisers, disinterested freeholders of said county, to ascertain the compensation to be made, to such owners or parties interested. Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had, in all other respects, as if provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act. Provided, the district shall not be authorized to enter upon and appropriate any right of way until the damages awarded are paid to the judge of said county court for the use of the parties interested and if the damages are not so paid within two years from the filing of such commissioners report, all proceedings as to the right of way not paid for shall abate at the cost of the district. Said board of supervisors, in behalf of such district, shall have the right to acquire and if need be, condemn, in the same manner as is hereinbefore provided for the acquirement and condemnation of rights of way, and natural or artificial obstructions in any existing water course and remove the same therefrom for the benefit of said district.

Section 13. (Objections to Engineer's Report.) (As amended.) Within ten days after the filing of the report of the engineer as provided by section 9 of this act with the chairman of the board of supervisors of the drainage district, the chairman of said board shall call a meeting at some public place in the county in which the said district was organized, at which meeting the said board shall fix the time and place in said county not more than 50 nor less than 40 days from the

day of said meeting for the hearing of all objections to the report of said engineer, and to the classification of the lands and other property therein, and all objections made by the owner or owners, of any land, property, easement or franchise upon which the said engineer proposes an assessment for benefits, as to whether the said classification is fair and just, and as to whether the said proposed assessment of benefits exceeds the benefits derived to their respective lands, and property from the said drainage improvements and all other matters and things connected with the proposed classification and assessment of benefits, in any way affecting said lands and property. The said board of supervisors shall give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, the last publication to be at least ten days before the day set for the hearing. It shall not be necessary in said notice for the said board of supervisors to name the parties interested and it shall be sufficient to say, "notice is hereby given to all parties interested in the following described lands and property in ———— county, Nebraska, (here describe the lands and property) included within (here insert name of drainage district) that the engineer heretofore appointed to make a topographical survey of said drainage district and maps and profiles thereof, and a complete plan for draining, reclaiming and protecting said district and an estimate of the cost of the proposed drainage improvements, and to assess benefits to the property and lands in said drainage district and to classify the same filed his report with the board of supervisors of (here insert the name of the drainage district) on the ———— day of ————, 19—, and you and each of you are hereby notified that you may file objections to said report within the time fixed by law. ————————
Chairman of the board of supervisors of drainage district Number ——— of ———— county, Nebraska.

A copy of the above notice fixing the time and place of said hearing together with a resolution adopting the same shall be spread at large on the minutes of the proceedings of the board

of supervisors of said drainage district, and the maps and profiles shall be placed on file with the secretary of the said board where all persons interested may have access to the same.

Section 14. (OBJECTION TO ASSESSMENTS.) (As amended.) The drainage district by its attorney or any owner of land or other property in said district whose land or property may be affected thereby may file objections to said report or to any item of the classification or the assessment of benefits therein set out, within ten days after the last day of publication of the notice provided for in the preceding section. All objections shall be heard by the board of supervisors fully and fairly and as speedily as may be to carry out liberally the purpose and needs of such drainage district. It shall not be necessary for said drainage district to file any answer or other pleadings to the objections, but said matters shall be deemed denied and said drainage district shall have the right to interpose any matters in defense thereto which it may have. Provided further, that said board of supervisors may adjourn any hearing or hearings for good cause from day to day, or to some future day as they may deem best, and that the said property owners for good cause shown by affidavit of themselves or agents may have said hearings adjourned for a period not to exceed two weeks.

Section 15. (HEARING.) (As amended.) At the time and place fixed in said notice the board of supervisors shall meet for the hearing of the objections. If they find that due notice has not been given as required by this Act, they shall continue the hearing to a date to be fixed by them, and order the publication of the notice as hereinbefore provided, and when they find that due notice has been given, they shall proceed to hear any objection or objections that may have been filed upon which an issue has been made, and for that purpose shall have the power to subpoena, swear and examine witnesses and to do all things necessary and incidental to a proper hearing and adjudication of said issues and shall examine the maps, profiles, plans and report of said engineer and the items of the

estimated cost of the drainage improvements, recommended, and the classification of the lands and property in said district and the assessments of the benefits to the same as proposed by said engineer.

After due consideration of all the evidence before them the said board of supervisors shall have power to adopt, amend, modify or reject the plan for the reclamation and protection of the lands and property in said district recommended by the said engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken by said district and to estimate the cost thereof. From the decision of the said board on these matters no appeal will lie, but upon a proper showing at any time thereafter the said board may modify their order should such modification be necessary to promote the welfare of the drainage district. Said drainage board shall also have the power to establish the classification of the lands and property, and to determine and adjudicate the total amount of benefit that will accrue to each lot, tract or parcel of land or other property in said district, from the drainage improvements. If an objection is overruled, the board may approve and confirm or modify the report as to the property affected, but if the objections are sustained, the board may amend, or modify the report in any particular, and if they find the said classification or assessment of benefits to the lands and other property to be in any respect inequitable, either less than, or in excess of the benefits accruing to said lands and property from said drainage improvements or in any particular unfair and unjust, they shall so order, and they shall thereupon so amend, adjust and equalize the said classification and benefits as may appear fair, just and equitable to them. And when said board has in said manner adjusted, equalized and determined the classification of and assessment of total benefits to the lands and other property in said district as above required they shall enter an order confirming the same.

Provided that all pleadings and other papers filed in the matter of said hearings shall be filed with the secretary of said board of supervisors and subpoenas and other process shall be issued by said secretary, and the said secretary shall be empowered to administer oaths to witnesses and to certify to records and papers under the seal of said drainage district.

Section 16. (COSTS.) The costs of said hearing in case of contest shall be taxed and assessed as follows: First, if the said matter shall be determined by said board against the parties' contention objecting to said assessment, all costs upon the hearing of his said objections shall be adjusted against said objector. And said board of supervisors shall have the right to recover the same from said objector or objectors for the benefit of said drainage corporation in a civil action for that purpose before a justice of the peace or any other court of competent jurisdiction in the name of said drainage corporation. Second, in case said matter is finally determined by said board of supervisors partly in favor of, and partly against, the contention of any objector, or objectors, the costs shall be apportioned between the drainage district and said objectors as said board shall deem just and equitable. Third, in case the contentions of said objectors is wholly sustained and the matter is fully determined in their favor by said board, the costs shall be paid by said drainage district. The fees allowed upon said hearing shall be the same as those now allowed upon the trial of civil actions in courts of justice of the peace in this state.

Section 17. (APPEAL.) (As amended.) Any person or corporation who has filed objections and had a hearing as herein provided or feeling aggrieved by the decision and judgment of the said board of supervisors, may appeal to the district court within and for the county in which said drainage district was originally established, upon giving a bond conditioned the same as in appeals to the district courts as from civil actions in justices' court in this state, and payable to said drainage corporation, and in addition thereto conditioned

that they will pay all damages which may accrue to said drainage district by reason of said appeal, which bond shall be approved by the secretary of said board of supervisors, and filed with said secretary within ten days after the rendition of the decision appealed from, within ten days after the filing of the said bond said secretary shall make and file a transcript of said hearing together with all the papers relating thereto, with the clerk of the district court, in which said matter has been appealed. Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, and the same shall be docketed and filed as in appeals in other civil actions to said court, and said court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by said court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required. The clerk of the district court shall forthwith certify the decision of the court to the board of supervisors who shall take such action as may be rendered necessary by such decisions.

Section 18. (LEVY OF TAX.) (As amended.) As soon as the said board of supervisors have adjudicated, fixed and established the classification and benefits as provided by section 15 of this act, they may at once levy a tax on the lands and other property in said district to which benefits have been assessed, equal in amount to the cost of such drainage works and improvements as estimated by the said engineer and as modified and confirmed by said board plus the actual expenses of organizing said district the probable working and administrative expenses and damages (as estimated by the said board of supervisors) in the completion of said work and improvements and the carrying out the objects of the said district, and in case bonds are issued, as provided in this act, then the amount

of the interest (as estimated by the board of supervisors) which will accrue on such bonds shall be included, and added to the said tax. The said tax shall be apportioned to and levied on each tract of land or property in said district in proportion to the benefits assessed and not in excess thereof. The said board shall determine whether the said tax shall be collected and paid in a single assessment, or be divided into not to exceed twenty annual installments. The said levy of the tax, when so fixed and determined, shall be evidenced and certified by the board of supervisors, to the county clerk of each county in which lands of said district are situated, which certificate shall be substantially in the following form: State of Nebraska, ——— county ss: To ——— county clerk of said county: This is to certify that by virtue of the provisions and terms of section 18 of article IV of chapter 89 of the Compiled Statutes of Nebraska for 1909, the board of supervisors of (here insert name of drainage district) including lands and property in the counties of ——— in the state of Nebraska, have and do hereby levy the special tax provided for in said section on the lands and property situated in your county, described in the following table:—in which table are: first, the names of the owners of said lands and property as they appeared in the decree of the district court organizing said district, or as then shown by the deed records of said county; second, the description of the said lands and property opposite the names of the said owners; and third, the amount of said tax levied on each tract of land or piece of property: (here insert such table). The tax shall be collected and payable in ——— annual installments, the amount of each annual installment will be certified to you not later than the first day of September in each year. Witness the signature of the chairman of the state board of supervisors, attested by the seal of said district and the signature of the secretary of said board on this ——— day of ——— A. D. 19—.

Secretary. (Seal.) President.

The said county clerk shall file said certificate in his office and record the same; provided further that if for any reason the cost of the drainage works and improvements exceeds the amount of the tax levied against the lands and property in said district, as above set out, the board of supervisors may levy such other and further installments as may be necessary to complete the said works and improvements, but the total amount of all such levies and installments shall in no event exceed the total amount of benefits assessed to the lands and property in said district, such additional cost shall be apportioned to the lots, tracts, lands and property in the same proportion as in the first apportionment, provided, the board of supervisors shall first give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, the last publication should be at least ten days before the day set for hearing, provided further that the board of supervisors may correct erroneous assessments and grant relief therefrom, and may correct clerical or other manifest errors in the schedules of the apportionment of the cost, discovered, after being certified to the county clerk. The said board of supervisors shall annually thereafter, determine, order and levy the amount of the installment of the tax herein before named which shall become due and be collected during said year at the same time that state and county taxes are due and collected, and in case bonds are issued as provided by section 20 of this act then the amount of the interest which will accrue on such bonds shall be included and added to said tax, which said annual installment and levy shall be evidenced and certified by the said board not later than September 1st of each year to the county clerk of each county in which lands of said district are situated which certificate shall be substantially in the following form: State of Nebraska, county of ——— ss: To ——— county clerk of said county. This is to certify that by virtue of the provisions of section 18, article IV of chapter 89 of the Compiled Statutes of Nebraska 1909, the board of supervisors of ——— drainage district in-

cluding lands and property in the counties of ———— in the state of Nebraska have and do hereby levy the annual installment of the total tax heretofore certified to you under the direction of said section 18 of this Act on the lands and property situated in your county described in the following table in which are: first, the names of the owners of said lands and properties as they appeared in the decree of the district court organizing said district, or as shown by the certificate heretofore filed showing the total assessment against said property; second, the description of the said lands and property opposite the names of the owners; and, third the amount of said annual installment and interest levied on each tract of land or piece of property (here insert table). The said installment of tax shall be collectable and payable the present year at the same time that state and county taxes are due and collected. Witness the signature of the chairman of said board of supervisors, attested by the seal of said district and the signature of the secretary of said board this ———— day of ———— A. D. 190—.

———————— ————————

Secretary. (Seal.) President.

Which said sertificate shall be filed in the office of said clerk and the said annual installment of said total tax so certified shall be extended by said county clerk on the tax books of the county against the real estate, right of way, road or property to be benefited, situate in such drainage district in the same manner that other taxes are now extended on the tax books of the county in a column under the head of "drainage tax" and shall be collected by the treasurer of the county in which the real estate is situate on which the tax is levied at the same time, and in the same manner, that the state and county taxes on said property are collected. Said county clerk shall be allowed the same fees as he receives for like services in other cases.

Section 19. (PUBLIC ROADS—RAILROAD.) (As amended.) That when any ditch, drain, improved water course, dyke, levy,

or other drainage improvement, located and established under this act, crosses, drains, or protects either in whole or in part any street, highway, public or corporate road or any railroad, or benefits any or either of said streets, or roads or railroads the board of supervisors shall apportion and set off to the county or a township, if a county road, or to a company if corporated, or a railroad and to a city or village if a street or alley a portion of the cost and expenses of the whole drainage improvements, the same as to private individuals and in proportion to the benefits conferred by such drainage improvements on said street, roads and railroads. Any apportionment of the cost and expenses of the drainage improvements that may be levied as a special tax or assessment against the property of any corporated road, or any railroad, or any telegraph or telephone company for benefits accruing to the property of said corporations situated within the physical boundaries of such drainage district, shall be enforced and collected in the same manner that state and county taxes are enforced against them under the general revenue laws of the state. Any apportionment of the costs and expenses aforesaid to a county, township city or village shall be filed as a claim, with the county, township, city or village clerk as the case may be, and may be enforced and collected as other judgments against such county, township or municipal corporation are enforced and collected.

Section 20. (BONDS.) (As amended.) The board of supervisors may, if in their judgment it seems best, issue negotiable bonds not to exceed the amount of the total tax levy certified to the county clerk or clerks as provided by section 18 of this Act, in denominations of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent payable semi-annually, to mature at annual intervals commencing after a period of five years, both principal and interest payable at the office of the county treasurer of the county in which said drainage district was organized or at some convenient banking house or trust company's office to be named

in said bond which said bond and interest coupons shall be executed in the name of the district and shall be signed by the chairman of the board of supervisors, attested with the seal of said drainage district and by the signature of the secretary of said board. Such bonds shall be made to run for not more than 20 years, and in case said bonds are made to mature at different times, within said period, said assessment shall be divided into as many installments as there are different dates of maturity of said bonds. They shall be numbered consecutively as issued and bear date at the time of their issue. Provided that the maturity of said bonds shall be fixed on the first day of July of the year in which said bonds mature and such bonds shall contain a recital that the same were issued in accordance with the provisions of this Act and that they are to be paid out of a sinking fund to be created as in this act provided. Before issuing any bonds under the provisions of this Act, the board of supervisors of said district shall by resolution duly engrossed in the minutes of a meeting to be especially held for that purpose, order and direct the issue thereof, specifying their number, amount, rate of interest, when due, and where payable. The said minutes shall be engrossed on the record of said board of supervisors, which said minutes and the record of said bonds shall at all times be open to the inspection of all parties interested in said district, either as tax payers or bond holders, and on the payment of any bond an entry shall be made in said records accordingly. Said bonds shall not be sold for less than par with accrued interest, shall show on their face the purpose for which they are issued, and shall be payable out of moneys derived from the aforesaid drainage assessments or taxes. It shall be the duty of the board of supervisors in making the annual tax levy as heretofore provided, to take into account the maturing bonds and interest on all bonds, and make ample provisions in advance for the payment thereof. All bonds hereafter issued by any drainage district organized under the provisions of this Act shall, before such bonds are sold or negotiated be presented to the auditor of public accounts and he shall examine

such bonds and all the proceedings relative to their issue, and if he be satisfied that such bonds have been legally issued as provided herein, register the same in his office in a book kept by him for such purpose, and under his seal of office certify upon such bonds the fact that they have been duly and legally issued, and that such bonds have been registered in his office in accordance with the provisions of this Act; the data filed in his office being the basis of such certificate. It shall be the duty of the secretary of the board of supervisors of the drainage district in which said bonds may hereafter be issued, to transmit with such bonds to the auditor of public accounts a duly certified transcript of all the proceedings, previous to the issuance of such bonds, relative thereto, for the information of the said auditor, and it is hereby made the duty of such secretary to furnish such transcript to the holder of any such bond on demand; provided however, that before such bonds are issued any person or corporation whose land or property has been assessed for benefits by said district, may pay the total amount of the cost and expenses apportioned to and levied as a tax against such lands and property or any lot, tract or subdivision thereof as set out in the assessment roll. The amount of bonds to be issued shall be reduced by the amount thus paid; when such payment has been made to the board of supervisors they shall place the sum so received in the depository in this Act provided for and shall give to said owner an acquittance showing such payment and such lands and property upon which payment has been made shall be released from the lien of such drainage tax and the bonds and the interest thereon shall be chargeable solely against the lots, tracts, lands and property not making such payment. The drainage board shall certify to the county clerk a list of the lands and property upon which such payment has been made, which list shall be filed and recorded in the office of said county clerk; provided further, that before funds can be secured by the levy of a tax or the sale of bonds, the board of supervisors of such drainage district shall have power to borrow money and pledge the credit of the district for the

payment of the same with interest in any sum not to exceed $5,000.00 to pay the necessary cost and expenses of the organization and incorporaiton of said district and all other legitimate charges and expenses incurred by the board and its officers and employees in performing the services and duties required of them by this Act.

Section 21. (LIEN OF DRAINAGE TAX.) All the assessments on real property and assessments shall be a lien against the said property assessed from and after the first Monday in April in the year in which it is assessed and shall draw interest at the rate of ten per cent per annum from the first day of May of the year following said assessment. And such lien is not removed until the assessments are paid or the property sold for the payment thereof, and it shall be the duty of the county treasurers to collect such assessments in the same manner as other taxes against real estate are collected, and the revenue laws of the state for the collection and sale of land for such taxes are hereby made applicable to the collection of assessments under this act and when bonds have been issued by the drainage district the taxes so collected to pay the same shall constitute a sinking fund to be used for the payment of said bonds and the interest thereon.

Section 22. (SALE OF BONDS.) The board may sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction of said ditches and works, the acquisition of said property and rights, and otherwise to fully carry out the object and purpose of this Act. Before making any sale, the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Lincoln, and in any other newspaper, at their discretion. The notice shall state that sealed pro-

posals will be received by the board at their office, for the purchase of bonds till the day and hour named in the resolution.

At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event sell any of said bonds for less than par. The money derived from the sale of any bonds shall be deposited by the said board of supervisors with some bank or trust company in any county in said district under such conditions as the said board may prescribe and may be withdrawn from said depository when ordered by the said board on check or warrant signed by the chairman and countersigned by the secretary thereof.

Section 23. (POWERS OF BOARD—EMINENT DOMAIN.) In order to effect the drainage of said district, the board is authorized to clean out and remove all obstructions from the bed of any stream, creek, bayou, lagoon or other water course in said district, to straighten or shorten and deepen or widen the course of any stream or to abandon the bed of any stream and construct a new channel therefor, and to fill up any channel, or part of a channel of any stream, creek, bayou, or other water course in order to turn the direction of the volume of water or to concentrate the water so as to deepen and form a main channel. The said board shall have the power to construct the said works across any street, avenue, highway, railway, canal, ditch or flume which the route of said ditches may intersect or cross, in such manner as to afford security for life and property but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the privilege aforesaid; and if such railroad, company and said board, or the owners and controllers of said property,

thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now, or may be the property of the state.

Section 24. (CONSTRUCTION—CONTRACT.) (As amended.) After the board of supervisors have certified the total levy of the costs and expenses of the drainage improvements to the county clerk as directed by section 18, they may proceed to let a contract for the construction of such improvements; and for that purpose they shall give notice by publication thereof for 20 days in a newspaper of general circulation in the county or counties in which the drainage district is situated, and in such other newspaper as they may deem advisable, calling for sealed bids for the construction of said improvements or any part thereof, notifying the public thereby of the time and place where such bids will be received and opened, and where the plans and specifications may be seen. On the day fixed the board shall open and consider the bids and may let the contract for the whole work, or any part thereof, to the lowest responsible bidder, or may reject any and all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contract for the purchase of materials shall be awarded to the lowest responsible bidder. The person to whom a contract is awarded shall enter into a bond with good and sufficient sureties, to be approved by the board, payable to the district for its use, for the amount of the contract price, conditioned for the faithful performance of such contract. The work shall be done under the direction, and to the satisfaction of the drain commissioner, and subject to the approval of the board.

Section 25. (ACT CUMULATIVE.) None of the provisions of this act shall be construed as repealing or in any wise modi-

fying the provisions of any other act relating to the subject of draining, reclaiming, or protecting swamp, overflow or submerged lands. Nothing herein contained shall be deemed to authorize any person, or persons, to divert the waters of any river, creek, stream, canal, or ditch from its channel to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use.

Section 26. (JOINT CONSTRUCTION—TWO DISTRICTS.) When two or more districts shall have their outlet or discharge into the same natural water course or stream and it shall become necessary to deepen or enlarge said natural water course or stream, each district shall be assessed for the cost of such work in the same ratio to such total cost as the discharge of waters of such district bears to the combined discharge of waters of the several districts emptying into said natural water course or stream; but no district shall be liable to contribute for any improvement or costs and expenses incurred in improving said natural water course or stream above the point of discharge of the waters of such district into the same.

Section 27. (USE OF DRAIN BY LAND OWNER.) The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or water course, as hereinbefore provided, shall have the right to use the ditch or water course as an outlet for lateral drains from said land, lot or premises.

Section 28. (DRAINAGE ACROSS LANDS OF ANOTHER.) If any person who owns land within the drainage district which has been assessed for benefits and which is separated from the ditch, drain or water course for which it has been assessed, by the land of another or others, shall desire to ditch or drain his said land across the land of such other or others into such ditch, drain or water course and shall be unable to agree with such other or others on the terms and conditions on which he

may enter upon their lands and construct such drains or ditch, he may proceed in the manner in this act provided, and the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established. He may file his petition with the clerk of the district court asking the said court to establish a sub-district within the limits of the original district for the purpose of securing more complete drainage, describing the lands to be affected thereby by metes and bounds or otherwise so as to convey an intelligent description of such lands; and all proceedings shall be the same as herein provided for the establishment, formation and construction of original districts and improvements thereof, including the assessment of benefits and when established and constructed, it shall be and become a part of the drainage system of such drainage district and be under the control and supervision of the board of supervisors.

Section 29. (TREASURER—COLLECTION OF ASSESSMENTS.) The treasurer of the county in which the drainage district, or the largest portion thereof, is situated, shall be *ex officio* treasurer of said drainage district, for the purposes of collecting and disbursing said tax or assessment, and the treasurers of the counties in which the smaller parts of the district shall be situated shall pay for the benefit of said drainage district, and shall take the receipt of the treasurer therefor, in duplicate, the original of which the treasurer paying the money shall keep for his own protection, and the duplicate shall be filed in the office of the clerk of the county in which the person receiving said money shall be treasurer. It shall be the duty of the treasurer, who is ex *officio* treasurer of the drainage district, to pay any money in his hands, collected as aforesaid, upon warrants, signed by the chairman and attested by secretary of the board of supervisors of the district, when the same shall be presented for payment. All warrants issued by the board of supervisors of the district, when the same shall be presented

for payment. All warrants issued by the board of supervisors of any drainage district shall be in the following form:

$———— No. ————

Treasurer of the county of ————; Pay to ———— dollars, out of any money in the treasury belonging to ——— drainage district in the county of ————, given at the town of ———— state of Nebraska. By order of the board of supervisors of ———— Drainage District.

Attest:———— ————

Secretary. Chairman.

Section 30. (WARRANTS.) The law of this state, under which county warrants are issued, sold, transferred, assigned, presented for payment and paid, shall apply to all warrants issued by virtue of the provisions of this Act.

Section 31. (COMPENSATION.) (As amended.) The board of supervisors, except where otherwise provided shall, by resolution, at the time of hiring or appointing provide for the compensation for work done and necessary expenses incurred by any officer, engineer, attorney, or other employee, and shall also pay the fees of all court and county officers who may by virtue of this Act render service to said district.

Section 32. (MAINTENANCE.) If at any time after the final construction of said improvements the same shall become out of repair, obstructed, inefficient, or defective from any cause, the said board of supervisors may order an assessment upon the lands in said drainage district for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property in said district as a basis to ascertain the ratio that each separate tract or lot of land or property bears to the whole amount to be levied and said board shall fix and determine the amount of the assessment or tax that shall be levied against each separate piece of property in said district, and to meet the requirements of this act, which said assessment shall be limited to the amount necessary to make and complete said repairs, remove said obstruction, or remedy any such defect, or defects,

and shall be levied and collected in the same manner as other assessments provided for in this act for the location, construction and operation of said system of drainage are collected and expended; Provided, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed, or by the act or negligence of his agent or employe, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employee or agent then the cost thereof shall be assessed and levied against the lands of such owner alone.

Section 33. (PRESERVATION—OVERSEERS.) For the purpose of preserving any ditch, drain, dyke, or other works constructed or erected under the provisions of this act, the board of supervisors shall have the power to appoint not more than three overseers of their respective district, who shall hold their offices for the term of one year; whose duty it shall be to keep the ditches, drains, dykes, and other works erected or constructed for the reclamation of the lands in the drainage district in good repair; and remove all obstruction from all ditches, drains, or water courses within their respective districts. It shall also be the duty of said overseer to cause the arrest of all persons who shall be known to have filled up, or put any timber or brush into, or to have in any way obstructed any ditch, drain, or water course, or have damaged any dyke, or other work erected or constructed for the reclamation of lands as aforesaid, within their respective districts, and bring them before a justice of the peace, or some other officer having jurisdiction for trial and punishment.

Section 34. (OBSTRUCTING DITCH—PENALTY.) If any person shall wilfully obstruct or injure any ditch, drain, or water course, or damage or destroy any dyke or other work constructed under the provision of this Act, he shall be liable to the drainage district for the full amount of the injury occasioned by the damage thereto, the same to be recovered by a civil action in the name of the district before any court hav-

ing jurisdiction thereof, and in addition thereto shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding the sum of one hundred dollars, and may be imprisoned until such fine and the costs of prosecution are paid.

Section 35. (ACT CONSTRUED.) This act shall be liberally construed to promote the drainage and reclamation of wet, overflowed or submerged lands, and the establishment of said corporation, and the collection of assessments shall not be defeated by reason of any defect in the proceedings occuring prior to the judgment of the court, or of the board of supervisors confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive and final, that all prior proceedings were regular and according to law, nor shall any person be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby, at any stage of the proceedings, and if the court or board of supervisors shall deem it just to release any person, or modify his assessment or liability, it shall in no manner affect the right or liability of any other person.

Section 36. (IRREGULARITIES—INJUNCTIONS.) The collection of assessments to be levied to pay for the location, construction, maintenance or repair of any ditch, levee, dyke, or water course, shall not be enjoined nor declared void; nor shall said assessment be set aside in consequence of any error, omission, or irregularity committed or appearing in any of the proceedings provided for by this act, and no injunction shall be allowed restricting the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from said district in any action brought for that purpose in case said injunction is made perpetual.

Section 37. Every district organized under the provisions of this act shall be a body politic and corporate and shall be known by the corporate name of Drainage District Number

——— of ——— county, and shall have power and authority to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, have and use a corporate seal, and exercise any and all other powers, as a corporation, necessary to carry out the purposes of this act.

Section 38. (SECTION REPEALED.) That chapter 116 of the laws of Nebraska for the year 1903, the same being sections 1 to 19 inclusive of article IV of chapter 89 of the Compiled Statutes of Nebraska for the year 1903, and sections 5561 to 5579 both inclusive of Cobbey's Annotated Statutes of Nebraska for the year 1903, and all other acts and parts of acts in conflict herewith, be and the same are hereby repealed.

Section 39. (EMERGENCY.) Whereas, an emergency exists, therefore, this act shall take effect and be in force from and after its passage and approval.

Approved March 29, 1905.

## EXHIBIT "B".

### How Lands Are Condemned For a Railroad Right of Way. (Parts of chapter 16, Compiled Statutes 1909.)

* * * *

Section 81 . (p. 575.) (EXERCISE OF THE RIGHT OF EMINENT DOMAIN.) Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line and may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains; Provided, That the lands so held, taken, and appropriated, otherwise than by the consent of the owner,

shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments or depositing waste earth; and Provided further, That no appropriation of private property, for the use of any corporation provided for in this subdivision, shall be made until full compensation therefor be first made or secured to the owners thereof; and Provided further, That any railroad company heretofore organized under said chapter 16 shall have the power and right to construct and operate interurban railroads, using motive power other than steam, and in the construction and operation of said interurban railroads shall have all the powers of eminent domain contained in said chapter.

* * * *

Section 97. (p. 580.) (APPRAISEMENT OF DAMAGES—APPEAL.) If the owner of any real estate over which said railroad corporation may desire to locate its road, shall refuse to grant the right of way through his or her premises, the county judge of the county in which said real estate may be situated, as provided in this subdivision, shall upon the application of either party direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate and thereafter they shall assess the damages which said owner shall sustain by the appropriation of his or her land to the use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state. And such record shall have the

like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before it enters upon said real estate, for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid it shall thereby be authorized to construct and maintain its said road over and across said premises. Provided, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated within sixty days after such assessment. And in case of such appeal, the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay, or deposit with such county judge, the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment. Provided, That if on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; Provided further, That either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited, shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court. And provided, further, That any railroad company desiring to acquire by condemnation proceedings the right to construct and operate its railroad with certain restrictions as to manner of operation or as to motive power, may in its petition to have property condemned set forth the manner in which and the motive power with which it proposes to operate its railroad and in such case in estimating the damages to property not taken the appraisers shall take in consideration the limitations set forth in said petition as to manner of aperation and motive power and upon appeal a

jury shall in estimating damages to property not taken take such limitations of manner of operation and motive power into consideration.

* * * *

Section 98. (p. 582.) (COMMISSIONERS SHALL ASSESS DAMAGES TO ALL REAL PROPERTY.) Freeholders so appointed shall be the commissioners to assess all damages to the owners of real estate in said county. And said corporation may upon the refusal of any owner or guardian of any owner of lands in said county to grant the right of way as aforesaid, by giving the said owner or guardian ten days notice in writing of the time and place of such assessment, have the damages assessed in the manner hereinbefore prescribed, and service of said notice may be made either by personal service or by leaving a copy thereof at the usual place of residence of said owner or guardian.

* * * *

(23,955)

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

NO. 804.

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HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR,

*vs.*

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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MOTION TO DISMISS AND AFFIRM, NOTICE AND BRIEF OF DEFENDANTS IN ERROR IN SUPPORT OF MOTION.

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# IN THE SUPREME COURT OF THE UNITED STATES.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN,
*Plaintiffs in Error,*
*vs.*
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL,
*Defendants in Error.*

23,955
OCTOBER TERM, 1913.
NO. 804.

## NOTICE OF SUBMISSION OF MOTION TO DISMISS AND AFFIRM.

Sirs:

Please take notice that on the annexed verified statement of facts herein and on all papers and proceedings herein, we shall submit to the Supreme Court of the United States at a stated term thereof, on Monday, April 27th, 1914, at the capitol, in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies; and that we shall submit with said motions and in support of the same the argument annexed to said statement of facts.

Dakota City, Nebraska, March 23rd, 1914.

Yours respectfully,

C. E. Strang and
R. O. Evans

*Attorneys and Counsel for Defendants in Error, Dakota, Nebraska.*

To HON. W. V. ALLEN, Madison, Nebraska, and M. D. TYLER, Esq., Norfolk, Nebraska,
*Attorneys for Plaintiffs in Error.*

# IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN,
*Plaintiffs in Error,*
*vs.*
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL,
*Defendants in Error.*

23,955
OCTOBER TERM, 1913.
NO. 804.

## MOTION TO DISMISS AND AFFIRM.

Comes now Jacob F. Leamer, John T. Daley, Fred Bartels, David Glenn Armour and Charles H. Maxwell, defendants in error, by A. C. Strong and R. E. Evans, their counsel, and move this court to dismiss and quash the paper purporting to be a writ of error for want of jurisdiction and because the paper purporting to be a writ of error is informal, irregular and insufficient on the grounds stated in the annexed argument and upon other grounds, and the said defendants in error also move this court to affirm the judgment and decree of the Supreme Court of the State of Nebraska and of the District Court of Nebraska for Dakota County herein upon the ground that it is manifest that the paper purporting to be a writ of error was taken for delay only and that the questions upon which it is claimed that jurisdiction depends are so frivolous as not to need further argument.

R. E. Evans and
A. C. Strong

*Attorneys and Counsel for Defendant in Error.*

## STATEMENT.

This action was instituted in the District Court of Dakota County, in the State of Nebraska, by the plaintiffs in error, owners of real estate situate in said county, to enjoin the entry of the defendants upon the land described in paragraph

1 of the petition. The defendants claim the right to enter upon the land in question by virtue of condemnation proceedings instituted by them as supervisors of Drainage District No. 2 of Dakota County, Nebraska.

The Drainage District No. 2 of Dakota County, Nebraska, hereinafter called the district, was organized under what is known as the Peabody Act (Chap. 161 of the Laws of Nebraska for 1909). It is sections 5,561 to 5,597 inclusive of Cobbeys Stat. (Ed. 1909), sections 6,239 to 6,267 inclusive of Comp. Stat. (Ed. 1909), and sections 1,797 to 1,865 Rev. Stat. of Nebraska (Ed. 1913). The sections so far as material to this controversy are as follows:

(The sections of the statute as used in this statement and argument where not otherwise particularly designated are Comp. Stat.)

ARTICLE IV, CHAPTER 89, COMP. STAT. (Ed. 1909).

Section 6239. —DRAINAGE DISTRICT—ARTICLES OF ASSOCIATION—CONTENTS.

"A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than one hundred and sixty acres, the names and place of residence of the owners of the land in said district, and the description of the several tracts or parcels of land in said district owned by those who may organize said district, and also the name or names and the description of the real estate owned by such as do not join in the organization of said district, but who will be benefited thereby, and such owners of real estate as are unknown, may be set out in such articles as such, and said articles shall further state that the owners of real estate so forming said district for said purpose are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may

be necessary to effect the drainage of the said lands so formed into a district, as provided by law, and after said articles of association shall be signed, the same, shall be filed in the office of the clerk of the district court of the county in which such drainage district is located, or, if such drainage district is composed of tracts or parcels of lands in two or more different counties, then in the office of the clerk of the district court of the county in which the greater portion of said proposed drainage district may be situated, praying that they may be declared a drainage district under this article."

History—Laws 1905, ch. 161, p. 610, sec. 1: in force March 29: "Resident" taken out 1909, p. 507, ch. 147, sec. 1: in force April 1. Cobbey 5561, Rev. Stat. 1797.

Comp. Stat. 6240—SERVICE OF PROCESS.

"Immediately after such articles of association shall have been filed, the clerk of the district court of the county in which the proposed district is located, and in case the drainage district is composed of territory situated in different counties, the clerk of the district court of the county in which the greater portion of the land and of the proposed district shall be situated, shall issue a summons, as now provided by law, returnable at the next term of the district court directed to the several owners of real estate in said proposed district who may be averred to be benefited thereby but have not signed said articles of association, which shall be served as summons in civil cases, and in case any owner or owners of real estate in said proposed district are unknown, or are non-residents, they shall be notified in the same manner as non-resident defendants are now by law notified in actions in the district courts of this state, setting forth in said notice that the articles of association, as aforesaid, have been filed. and the purpose thereof, and that the real estate of such owner or owners situated in said district, fully describing the same, will be affected thereby, and rendered liable to taxation, or assessment, for the purposes of draining said district, and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same."

History—Laws 1905, ch. 161, p. 610, sec. 2: in force

March 29. Cobbey 5562. Rev. Stat. 1798.

Comp. Stat. 6241. OBJECTIONS—HEARING—JUDGMENT.

"All owners of real estate in said districts who have not signed said articles of association and who may object to the organization of said drainage district, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection, or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in said drainage district, and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case such objections are overruled, the district court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain 160 acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements; and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for."

History—Laws 1905, ch. 161, p. 612, sec. 3: in force

March 29. Cobbey 5563. Rev. Stat. 1799.

Comp. Stat. 6242. FILING ARTICLES.

"Within twenty days after the said district has been declared a corporation by the court the clerk thereof shall transmit to the Secretary of State a certified copy of the record relating thereto, and the same shall be filed in his office in the same manner as articles of incorporation are now required to be filed under the general law concerning corporations. A copy of said record, together with a plat of the district shall also be filed in the office of the county clerk of the county, or counties, in which said district, or any

part thereof, is situated."

History—Laws 1905, ch. 161, p. 613, sec. 4: in force March 29. Cobbey 5564. Rev. Stat. 1800.

Comp. Stat. 6243. BOARD OF SUPERVISORS—REPRESENTATION.

"Within thirty days after the said district court shall have declared any drainage district organized, the clerk of said court shall upon fifteen days' notice, call a meeting of the owners of said real estate situated in said district at a day and hour specified, in some public place in the county in which said district was organized for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district and a majority of whom shall be residents of the county, or counties in which such district is situated; the land owners, when assembled, shall organize by the election of a chairman and secretary of the meeting, who shall conduct the election; and at such election each and every acre of land shall represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in such district, and the five persons receiving the highest number of votes shall be declared elected as supervisors; and they shall immediately by lot determine their terms of office, which shall be respectively one, two, three, four and five years, and until their successors are elected and qualified."

History—Laws 1905, ch. 161, p. 613, sec. 5: in force March 29: "to" inserted 1907, ch. 152, p. 467, sec. 1: in force March 30. Cobbey 5565. Rev. Stat. 1801.

Section 6244 Comp. Stat. relates to the manner of holding subsequent elections, the giving of notice thereof and the term of office of the supervisors.

Section 6245 Comp. Stat. relates to the supervisors' oath of office.

Section 6246 Comp. Stat. relates to officers' report and compensation.

Comp. Stat. 6247. SURVEY—PLAT—ESTIMATE—REPORT.

"The Board of Supervisors of any drainage district organized as aforesaid shall cause a topographical survey to

be made of the district by some competent engineer. The said engineer shall make a complete topographical survey of the said district and submit the same to the board of supervisors with maps and profiles of said survey and a full and complete plan for draining, reclaiming, and protecting the lands in said district from the overflow of or damage by water, or floods; and also the physical characteristics and location of any right of way, road bed, bridge or bridges and other property or improvements in said district belonging to or under the control of any railroad company; and shall also report the location of any and all public highways, which may be crossed by the right of way of any ditch, levy or other improvement planned for said district. The said engineer shall also make an estimate of the cost of the entire drainage works and improvements required in said district to protect and reclaim said lands and property, showing the several items of the same. The said engineer shall go over and inspect and examine the lands in said districts, the railroad rights of way, road beds, bridges, culverts, depot grounds, grades, and all other railroad, telephone and telegraph property in said district; and shall also inspect and examine all other improvements, streets, highways and bridges belonging to any county, municipal or other corporation and which may be affected by the proposed drainage and reclamation works and improvements, and shall also examine the streams, water courses, dtiches, ponds, lakes, and bayous within the district or which may be partly within and partly without said district. He shall assess, as hereinafter directed and according to the rules hereinafter prescribed the amount of benefits which will accrue to each tract or parcel of land and corporate property above named, by virtue of the works and improvements of said drainage district. Each tract or parcel of land, rights of way, and railroad bed, bridges, culverts and depots within the district shall bear its share of the entire cost and expenses incurred by said district in making said works and improvements in proportion to the benefits assessed, whether such improvements be made on the tract or parcel of land, rights of way, or railroad bed or not. The engineer, in estimating the benefits to lands, streets, highways, railroad property, rights of way, railroad beds, not

traversed by such works and improvements, shall not consider what benefits will be derived by said lands after other ditches, improvements, or drainage plans shall be constructed, but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage or an outlet for drainage, or protection from overflow or damage by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water. The benefits to public streets and highways, railroad property, right of way, and road bed, shall be assessed according to the increased efficiency and value added thereto by reason of and the protection derived from the aforesaid drainage works and improvements. Said engineer shall also classify said lots, tracts, lands, and other property according to the benefit that each may receive from said drainage improvement. The lots, tracts and lands receiving the greatest percentage of benefits shall be classified at 100, those receiving a less percentage of benefit at such less number as its benefit may determine. The property of public and private corporations may be classified in a list by themselves, each according to the relation its total benefit bears to the total benefit in the district. The maps herein provided for shall be drawn upon a scale sufficiently large to represent all of the meanderings of the proposed improvements, and shall show the boundary lines of each lot, or tract of land, and of each street, road, or railroad to be benefited thereby, the name of the owner of each lot or tract of land, as it then appeared on the deed records, the authority or company having in charge or controlling each public or corporate street, road or railroad, the distance in feet through each tract or parcel of land, the acreage thereof and such other matters as the surveyor or engineer deems material. The profile shall show the surface, the grade lines, gradients, fixed and working sections and said report shall be filed with the board of supervisors of said district within sixty days after making said survey."

History—Laws 1905, ch. 161, p. 614, sec. 9: in force March 29; amended 1909, p. 509, ch. 147, sec. 3; in force April 1. Cobbey 5569. Rev. Stat. 1805-6-7-8-9-10-11-12-13.

Section 6248 Comp. Stat. relates to the office of Drainage Commissioner (who has supervision of the work during construction), his oath and bond.

Section 6249 Comp. Stat. relates to the proceedings by which other benefited lands are brought into the district.

Comp. Stat. 6250. METHOD OF CONDEMNING RIGHT OF WAY.

"When said board of supervisors, by order entered of record, have agreed upon a location or route for said ditch or ditches and formulated a plan for the other improvements contemplated, then, they, in behalf of such district, shall have the right to acquire and if need be condemn any real estate, easement or franchise, *whether the same be within the limits of such district or outside its boundaries*, that may be necessary for a right of way over or upon which to construct and maintain the ditches, dykes, drains, and other works contemplated by any of the provisions of this act, and when the board of supervisors are unable to agree with the owners of any such property as to the acquisition of such right of way, or if the owners are not residents of the county, or cannot be found, or are minors or persons of unsound mind, or incapable of making a legal contract, the board of supervisors when other means are not specifically provided, may present to the judge of the county court of the county in which said land, easements or franchise are situated, a petition setting forth the location and character of the right of way needed and describing the lands to be crossed, the size of the ditches, levees, dykes and other works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of three apraisers, disinterested freeholders of said county, to ascertain the compensation to be made, to such owners or parties interested. Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad cor-

porations, the payment of damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act. Provided: the district shall not be authorized to enter upon and appropriate any right of way until the damages awarded are paid to the judge of said County Court for the use of the parties interested and if the damages are not so paid within two years from the filing of such commissioners' report, all proceedings as to the right of way not paid for shall abate at the cost of the district. Said board of supervisors, in behalf of such district, shall have the right to acquire, and if need be, condemn, in the same manner as is hereinbefore provided for the acquirement and condemnation of rights of way, any natural or artificial obstruction in any existing water course and remove the same therefrom for the benefit of said district."

History—Laws 1905, ch. 161, p. 618, sec. 12; in force March 29. Cobbey 5572. Rev. Stat. 1816-17.

Sections 6251, 6252 and 6253, Comp. Stat., are sections amended to comply with the doctrine announced in Neal vs. Van Sickel, supra and as amended are as follows:

Comp. Stat. 6251. ASSESSMENT OF TAX—BENEFITS—PROCEDURE.

"Within ten days after the filing of the report of the engineer as provided by section 9 of this act (6247) with the chairman of the board of supervisors of the drainage district, the chairman of said board shall call a meeting at some public place in the county in which the said district was organized, at which meeting the said board shall fix the time and place in said county not more than 50 nor less than 40 days from the day of said meeting for the hearing of all objections to the report of said engineer, and to the classification of the lands and other property therein, and all objections made by the owner or owners, of any land, property, easement or franchise upon which the said engineer proposes an assessment for benefits, as to whether the said classification is fair and just, and as to whether the said proposed assessment of benefits exceeds the benefits derived to their respective lands and property from the said drainage improvements, and all other matters and things connected with the proposed classification and assessment of benefits, in any way affecting said lands

and property. The said board of supervisors shall give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, the last publication to be at least ten days before the day set for the hearing. It shall not be necessary in said notice for the said board of supervisors to name the parties interested and it shall be sufficient to say "notice is hereby given to all parties interested in the following described lands and property in ---------- county, Nebraska (here describe the lands and property), included within (here insert name of drainage district) that the engineer heretofore appointed to make a topographical survey of said drainage district and maps and profiles thereof, and a complete plan for draining, reclaiming and protecting said district and an estimate of the cost of the proposed drainage improvements, and to assess benefits to the property and lands in said drainage district and to classify the same, filed his report with the board of supervisors of (here insert the name of the drainage district) on the ---------- day of ----------, 19----, and you and each of you are hereby notified that you may file objections to said report within the time fixed by law.

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Chairman of the board of supervisors of drainage district number ---------- of ----------county, Nebraska.

A copy of the above notice fixing the time and place of said hearing, together with a resolution adopting the same, shall be spread on the records of said board. The said reports of the engineer shall be spread at large on the minutes of the proceedings of the board of supervisors of said drainage district, and the maps and profiles shall be placed on file with the secretary of the said board where all persons interested may have access to the same."

History—Laws 1905, ch. 161, p. 619, sec. 13; in force March 29; amended 1909, p. 511, ch. 147, sec. 4; in force April 1. obbey 5573. Rev. Stat. 1818-19-20.

Comp. Stat. 6252. OBJECTIONS TO ASSESSMENTS —APPLICATION FOR COMPENSATION—PROCEDURE.

"The drainage district by its attorney or any owner of land or other property in said district whose land or property may be affected thereby may file objections to said report or to any item of the classification or the assessment of benefits therein set out, within ten days after the last day of publication of the notice provided for in the preceding section. All objections shall be heard by the board of supervisors fully and fairly and as speedily as may be to carry out liberally the purposes and needs of such drainage district. It shall not be necessary for said drainage district to file any answer or other pleadings to the objections, claims or other pleadings filed by said persons in answer to said proposed assessment as provided in this section, but said matters shall be deemed denied and said drainage district shall have the right to interpose any matters in defense thereto which it may have. Provided further, that said board of supervisors may adjourn any hearing or hearings for good cause from day to day, or to some future day as they may deem best, and that the said property owners for good cause shown by affidavit of themselves or agents may have said hearings adjourned for a period not to exceed two weeks."

History—Laws 1905, ch. 161, p. 621, sec. 14; in force March 29; amended 1909, p. 513, ch. 147, sec. 5; in force April 1. Cobbey 5574. Rev. Stat. 1821.

Comp. Stat. 6253. HEARING.

"At the time and place fixed in said notice the Board of Supervisors shall meet for the hearing of the objections. If they find that due notice has not been given as required by this act, they shall continue the hearing to a date to be fixed by them, and order the publication of the notice as hereinbefore provided, and when they find that due notice has been given, they shall proceed to hear any objection or objections that may have been filed upon which an issue has been made, and for that purpose shall have the power to subpoena, swear and examine witnesses and to do all things necessary and incidental to a proper hearing and adjudication of said issues and shall examine the maps, profiles, plans and report of said

engineer and the items of the estimated cost of the drainage improvements recommended, and the classification of the lands and property in said district and the assessments of the benefits to the same as proposed by said engineer. After due consideration of all the evidence before them the said board of supervisors shall have power to adopt, amend, modify, or reject the plan for the reclamation and protection of the lands and property in said district recommended by the said engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken by said district and to estimate the cost thereof. From the decision of the said board on these matters no appeal will lie, but upon a proper showing at any time thereafter the said board may modify their order should such modification be necessary to promote the welfare of the drainage district. Said drainage board shall also have the power to establish the classification of the lands and property, and to determine and adjudicate the total amount of the benefit that will accrue to each lot, tract or parcel of land or other property in said district, from the drainage improvements. If an objection is overruled, the board may approve and confirm or modify the report as to the property affected, but if the objections are sustained, the board may amend, or modify the report in any particular, and if they find the said classification of assessment of benefits to the lands and other property to be in any respect inequitable, either less than or in excess of the benefits accruing to said lands and property from said drainage improvements or in any particular unfair and unjust, they shall so order, and they shall thereupon so amend, adjust and equalize the said classification and benefits as may appear fair, just and equitable to them. And when said board has in said manner adjusted, equalized and determined the classification of and assessment of total benefits to the lands and other property in said district as above required they shall enter an order confirming the same. Provided that all pleadings and other papers filed in the matter of said hearings shall be filed with the secretary of said board of supervisors and subpoenas and other process shall be issued by said secretary, and the said secretary shall be empowered to administer oaths to witnesses and to certify to

records and papers under the seal of said drainage district."

History—Laws 1905, ch. 161, p. 622, sec. 15; in force March 29; amended 1909, p. 513, ch. 147, sec. 6; in force April 1. Cobbey 5575. Rev. Stat. 1822.

Comp. Stat. 6254. COSTS.

"The costs of said hearing in case of contest shall be taxed and assessed as follows: First, if the said matter shall be determined by said board against the parties' contention objecting to said assessment, all costs upon the hearing of his said objections shall be adjudged against said objector and said board of supervisors shall have the right to recover the same from said objector or objectors for the benefit of said drainage corporation in a civil action for that purpose before a justice of the peace or any other court of competent jurisdiction in the name of said drainage corporation. Second, in case said matter is finally determined by said board of supervisors partly in favor of, and partly against, the contention of any objector, or objectors, the costs shall be apportioned between the drainage district and said objectors as said board shall deem just and equitable. Third, in case the contentions of said objectors is wholly sustained and the matter is fully determined in their favor by said board, the costs shall be paid by said drainage district. The fees allowed upon said hearings shall be the same as those now allowed upon the trial of civil actions in courts of justices of the peace in this state."

History—Laws 1905, ch. 161, p. 623, sec. 16; in force March 28; Cobbey 5576. Rev. Stat. 1823.

Comp. Stat. 6255. APPEAL.

"Any person or corporation who has filed objections and had a hearing as herein provided for, feeling aggrieved by the decision and judgment of the said board of supervisors, may appeal to the district court within and for the county in which said drainage district was originally established, upon giving a bond conditioned the same as in appeals to the district court as from civil actions in justices' courts in this state, and payable to said drainage corporation, and in addition thereto conditioned that they will pay all damages which my accrue to said drainage district by reason of said appeal, which bond shall be approved by the secretary of said board

of supervisors, and filed with said secretary within ten days after the rendition of the decision appealed from, within ten days after the filing of the said bond said secretary shall make and file a transcript of said hearing together with all the papers relating thereto, with the clerk of the district court, in which said matter has been appealed. Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, and the same shall be docketed and filed as in appeals in other civil actions to said court, and said court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase, or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by said court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required. The clerk of the district court shall forthwith certify the decision of the court to the board of supervisors who shall take such action as may be rendered necessary by such decisions."

History—Laws 1905, ch. 161, p. 623, sec. 17; in force March 29; amended 1909, p. 515, ch. 147, sec. 7; in force April 1. Cobbeys 5577. Rev. Stat. 1824.

Section 6256, Comp. Stat., provides for the certifying of the assessments of benefits and levies of taxes to the county clerk of the county and that the total amount of tax levies shall never exceed the benefits assessed to each particular tract or lot of land.

Section 6256a, Comp. Stat., provides for the making of a supplemental assessment in case the first shall be insufficient to pay the cost of the improvement.

Section 6257, Comp. Stat., provides for assessing public roads and railroads for benefits received by such road or railroads.

Section 6257a, Comp. Stat., provides the manner in which funds may be borrowed or bonds of the district issued and giving land owners the privilege of paying off their share of the bond and relieving their land from the lien of the assessment and bond.

Section 6257a1, Comp. Stat., provides the manner in which

funds shall be collected to pay the bonds.

Section 6257b, Comp. Stat., relates to the lien of the assessments on the land within the district benefited by the improvement.

Section 6257c, Comp. Stat., provides for the sale of the bonds, the record thereof, the depository and bond of the depository.

Comp. Stat. 6257d. REMOVING OBSTRUCTIONS CROSSING PUBLIC WORKS.

"In order to effect the drainage of said district, the board is authorized to clean out and remove all obstructions from the bed of any stream, creek, bayou, lagoon or other water course in said district, to straighten or shorten and deepen or widen the course of any stream or to abandon the bed of any stream and construct a new channel therefor, and to fill up any channel, or part of a channel or any stream, creek, bayou, or other water course in order to turn the direction of the volume of water or to concentrate the water so as to deepen and form a main channel. The said board shall have the power to construct the said works across any street, avenue, highway, railway, canal, ditch or flume which the route of said ditches may intersect or cross, in such manner as to afford security for life and property, but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the privilege aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now, or may be the property of the state."

History—Laws 1905, ch. 161, p. 628, sec. 23 in force March 29. Cobbey's Stat. 5583, Rev. Stat. 1847, 1848.

Section 6257e, Comp. Stat., provides for the letting of contracts for the construction of the improvements upon bids after notice of the letting.

Section 6257f, Comp. Stat., provides that this act shall not affect any other act relating to drainage.

Section 6257g, Comp. Stat., provides for enlarging the outlet when two or more drainage districts use the same outlet and it is insufficient.

Section 6257h, Comp. Stat., gives a land owner within the district the right to run ditches from his own land into the ditches of the district.

Section 6257i, Comp. Stat., provides for sub-districts within the main district and gives right of access to the ditches.

Section 6257j, Comp. Stat., makes the county treasurer the collector of the taxes and to pay them out on warrants drawn by the district officers.

Section 6257k, Comp. Stat., provides district warrants shall be treated same as county warrants.

Section 6257l, provides for pay of officers of the district and cost and fees made necessary in carrying out the provisions of this act.

Section 6257m, Comp. Stat., provides for assessments for repairs of the improvement.

Section 6257n, Comp. Stat., provides for the care of the ditch after it is constructed.

Section 6257o, Comp. Stat., makes it a crime to injure or obstruct the ditch and fixes a penalty.

Section 6257p, Comp. Stat., provides that the act shall be liberally constructed.

Section 6257q, Comp. Stat., provides that mere irregularities shall not make assessments or levies void and no injunction shall be allowed to restrain collection until it has been first paid to county treasurer.

Comp. Stat. 6257r. EACH DISTRICT A CORPORATION—POWERS.

"Every district organized under the provisions of this act shall be a body politic and corporate, and shall be known by the corporate name of 'Drainage District Number_____ of _____County,' and shall have power and authority to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, have and use a corporate seal, and exercise any and all other powers, as a corporation, necessary to carry out the purposes of this act."

History—Laws 1905, ch. 161, p. 635, sec. 37; in force March 29. Cobbey 5597. Rev. Stat. 1864.

Section 6257rl, Comp. Stat., makes this act applicable to any proceeding already commenced under sections repealed.

The Constitution of Nebraska with reference to eminent domain is as follows:

"Art. I., Sec. 21. The property of no person shall be taken or damaged for public use without just compensation therefor."

The provisions of the Constitution of Nebraska with reference to courts and material to this controversy are as follows:

"Art. VI. Section 1. The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

"Section 15. There shall be elected in and for each organized county, one judge, who shall be judge of the county court of such county, and whose term of office shall be two years."

"Section 16. County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices; and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six

months' imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars."

"Section 17. Appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases, on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law."

The statute for the condemnation of railroad right of way follows:

Section 2015. Condemnation—Compensation for property appropriated.

"Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, work shops, depots, machine shops, switches, side-tracks, turntables, and water-stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by acqueducts, and the right of making proper drains; provided, that the lands so held, taken and appropriated, otherwise than by the consent of the owner, shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth; and provided further, that no appropriation of private property, for the use of any corporation provided for in this sub-division, shall be made until full compensation therefor BE FIRST MADE OR SECURED TO THE OWNERS THEREOF; and Provided further, That any railroad company heretofore organized or that may hereafter be organied under said chapter 16 shall have the power and right to construct and operate interurban railroads, using motive power other than steam, and in the construction and opera-

tion of said interurban railroads shall have all the powers of eminent domain contained in said chapter."

History—Laws 1866, R. S., ch. 25, p. 217, sec. 81;

2030. PROPERTY OF MINORS, etc.—HOW ACQUIRED.

"Whenever any railroad corporation shall take any real estate as aforesaid, of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person, or such married woman with the guardian of such husband may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate, and may give valid releases and discharges therefor."

History—Laws 1866, R. S., p. 223, ch. 25, p. 96.

2031. RIGHT OF WAY—APPRAISEMENT OF DAMAGES.

"If the owner of any real estate, over which said railroad corporation may desire to locate its road, shall refuse to grant the right of way through his or her premises, the county judge of the county in which said real estate may be situated, as provided in this sub-division, shall upon the application of either party direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate and thereafter they shall assess the damages which said owner shall sustain by the appropriation of his or her land to the use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state. And such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before it enters upon said real estate, for

the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, it shall thereby be authorized to construct and maintain its said road over and across said premises. Provided, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated within sixty days after such assessment. And in case of such appeal, the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay, or deposit with such county judge, the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment. Provided, That if on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; provided further, that either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited, shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court. And provided further, That any railroad company desiring to acquire by condemnation prcoeedings the right to construct and operate its railroad with certain restrictions as to the manner of operation or as to motive power, may in its petition to have property condemned set forth the manner in which and the motive power with which it proposes to operate its railroad and in such case in estimating the damages to property not taken the appraisers shall take into consideration the limitation set forth in said petition as to manner of operation and motive power and upon appeal a jury shall, in estimating damages to property not taken, take such limitations of manner of operation and motive power into consideration."

History—Laws 1866, R. S., ch. 25, p. 224, sec. 97; 1883, ch. 18, p. 179, sec. 1; approved February 20; amended 1903, ch. 28, p. 267; in force August 1.

2032. RIGHT TO APPEAL FROM ASSESSMENT OF DAMAGES.

"That either party shall have the right to appeal to the district court of the county where the lands are situated from the assessment of damages allowed and mentioned in the next preceding section at any time within 60 days after the filing of the report of the appraisers with the county judge."

History—Laws 1887, ch. 16, p. 333, sec. 1; in force March 31; amended 1905, ch. 40, p. 279, sec. 4; in force March 25.

2033. BOND ON APPEAL—CONDITIONS.

"That the party appealing shall within 30 days after such assessment enter into an undertaking to the adverse party with at least one good and sufficient surety, to be approved by the county judge of said county; conditioned, first, that the appellant shall prosecute such appeal to effect without unnecessary delay; and second, that if judgment be adjudged against the appellant on the appeal, the appellant shall satisfy whatever judgment may be adjudged against such appellant."

History—Laws 1887, ch. 16, p. 333, sec. 2; in force March 31; term reduced from sixty days, 1905, ch. 40, p. 279, sec. 5; in force March 25.

2034. FILING TRANSCRIPT ON APPEAL.

"That the appellant shall within the 60 days allowed for such appeal procure and file in the office of the clerk of the district court a certified transcript of all the proceedings of such assessment, including also all papers and files relating to or connected with the assessment appealed from and the county judge shall upon demand make such certified transcript and deliver the same to the appellant."

History—Laws 1887, ch. 16, p. 334, sec. 3; in force March 31; amended 1905, ch. 40, p. 280, sec. 6; in force March 25.

2035. HOW APPEAL TREATED IN DISTRICT COURT.

"That upon the filing of such transcript in the district court within 60 days from the date of the filing of the appraisers assessment appealed from the appeal shall be deemed per-

fected and completed and the cause shall be docketed by the clerk of the district court making the owner of the land plaintiff in the appellate court and the railroad company defendant therein and the parties shall proceed in all respects in the trial of said cause in the same manner as though the action had been originally instituted in such appellate court."

History—Laws 1887, ch. 16, p. 16, p. 334, sec. 4; in force March 31; amended 1905, ch. 40, p. 280, sec. 7; in force March 25.

2036. SEVERAL TRACTS JOINED IN ONE APPEAL.

"That assessments made for the right of way for the same railroad company upon and through different tracts of land belonging to the same owner or owners in the same right in the same county may be joined in one appeal and proceeded with in the appellate court as separate accounts joined in one action for damages to such tracts of land for and on account of such right of way."

History—Laws 1887, ch. 16, p. 334, sec. 5; in force March 31; amended 1905, ch. 40, p. 280, sec. 8; in force March 25.

2041. FREEHOLDERS TO ASSESS DAMAGES—NOTICE.

"Freeholders so appointed shall be the commissioners to assess all damages to the owners of real estate in said county. And said corporation may upon the refusal of any owner or guardian of any owner of lands in said county to grant the right of way as aforesaid, *by giving the said owner or guardian ten days' notice in writing of the time and place of such assessment, have the damages assessed in the manner hereinbefore prescribed, and service of said notice may be made either by personal service or by leaving a copy thereof at the usual place or residence of said owner or guardian.*"

History—Laws 1866 R. S., ch. 25, p. 225, sec. 98.

2042. SHERIFF SUMMON THOSE SELECTED TO FILL VACANCY.

"In case of the death, absence, or refusal or neglect of any of said freeholders to act as commissioners as aforesaid, the sheriff shall, upon the selection of said probate judge, summon other freeholders to complete the panel, and said

commissioners shall proceed as directed in the preceding section. Said commissioners shall receive two dollars per day, each, for their services, and the same shall be taxed in the bill of costs."

History—Laws 1866, R. S., ch. 25, p. 225, sec. 99.

2043. RIGHT OF WAY THROUGH LANDS OF NON-RESIDENTS—HOW APPROPRIATED.

"If, upon the location of said railroad it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of such real estate, by publication four consecutive weeks in some newspaper published in the county where such lands may lie, if there be any, and if not, in one nearest thereto on the line of their said road, that said railroad has been located through his or his lands; and if such owner shall not within thirty days thereafter apply to said probate judge to have the damages assessed in the mode prescribed in the preceding sections, said company may proceed as herein set forth, to have the damages assessed, subject to the same right of appeal as in case of resident owners; and upon the payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this sub-division."

History—Laws 1866, R. S., ch. 25, p. 225, sec. 100.

Dakota County is the northeastern county of the State of Nebraska, its northern and eastern boundary being the Missouri river.

The incorporated village of Jackson, which has a population of about four hundred people, is situated in sections 35 and 36, township 29, range 7 east of the Sixth Principal Meridian in Dakota County, Nebraska. To the northwest thereof, and coming close to Jackson are hills intersected and divided by sharp ravines through one of which flows in a southeasterly direction, a well defined stream or water course known as Elk Creek, which constantly contains running water and has sharp and well defined banks and a channel, and into which flows, above said village of Jackson, the waters of tributary streams. In this way through Elk Creek is drained about 100 square miles of land in Dakota and Dixon coun-

ties, Nebraska. Close to the southern boundary of Jackson Elk Creek discharges all its waters onto a tract of flat, low, marsh or swamp land embracing from 18 to 20 contiguous sections forming a compact body, and frequently by reason of melting snows and heavy rains, the banks of said Elk Creek are overflowed and the waters thereof extend onto the small valley northwest of Jackson, through which it has its course, and all of said water is carried down stream and cast upon said low lands and they are flooded for many days by reason thereof from a depth of one to three feet.

Jackson Lake or Cut-Off Lake is an abandoned channel of the Missouri river and from which to the Missouri river to the northeast there is an open channel or waterway.

From where Elk Creek reaches the open bottom to Jackson Lake or Cut-Off Lake along the line of the proposed ditch is less than two miles and a quarter, and from the initial point of the proposed ditch following its line to Jackson Lake is about two and a half miles. From the same point following the line over which the water now flows to the nearest point at which it could be placed in the Missouri river, is not less than thirteen miles, and following the line which the creek now takes to reach the river, is not less than nineteen miles. The land in Dakota County bottom, unless overflowed by water, is all of the same general character, and is the finest of farming land to be found anywhere. This is evidenced by the price which the appellants fix upon their land through which the ditch runs and which is of the same general character as all of the Missouri river bottom land. Lying southeasterly from the initial point of the proposed ditch is the tract of low land above alluded to, in diamond shape, comprising something over 7,000 acres of land. This tract is the territory included within Drainage District No. 2 of Dakota County, Nebraska. It is skirted on the west and southwest by the Missouri river bluffs and is almost level, sloping gradually and slightly to the southeast, the slope or inclination being about a foot to the mile. Over this tract the waters of Elk Creek flow. This tract when drained will, for agricultural purposes, be more valuable than any other land in the state, as it has been fertilized by the flood water for hundreds of years and has never had its productiveness depleted by

cropping. It is the purpose of Drainage District Number Two of Dakota County, Nebraska, to drain this 7,000 acre tract by carrying the water that flows through Elk Creek on to this district, two and a half miles northeast, and put it into Jackson or Cut-Off Lake and thence into the Missouri river, and by another ditch to take the water which naturally falls on the territory and which will flow from Pigeon Creek, which enters the district about west of its center, down over the line of natural flowage.

ORGANIZATION OF DISTRICT.

On the 4th day of September, 1909, these defendants and other owners of these wet lands constituting a majority in interest of both owners and resident owners, filed in the District Court of Dakota County, Nebraska, a petition and proposed articles of association in which they describe the district proposed, by giving a continuous outline boundary inclosing it and then describing each particular tract of land owned by any single owner, or joint owners, giving the name of the owner and his address, stating that the land described will be benefited by the proposed improvement, and if the owner was one of the petitioners alleging that he consented to the formation of the district and obligated himself to pay the taxes and assessments levied to pay for the improvement, and if he was not one of the petitioners alleging that he did not consent to the formation of the district. This petition was signed by more than a majority in interest of those who were resident owners and by more than a majority in interest of those who were owners. In determining the majority in interest an acre or lot was counted as a unit. (Printed Trans. of Rec. pp. 24-26). The necessary affidavit for service on non-resident owners was filed. (See Printed Trans. of Rec., pp. 27, 28). A summons in form prescribed by law under the Code, except only as modified by the drainage statute (Sec. 6240 Comp. Stat.), which fixed the return day on the first day of the next term of the District Court, was served upon each and every owner a resident of Nebraska who had not signed the petition asking for the formation of the district. The service was made by the proper officer of Dakota County, as to those who resided within said county. (See Pr. Tr. of Rec.

pp. 38-40). Where owners resided in another county in the State of Nebraska, the summons was directed to the sheriff of that county and was served by him, the returns to such summons being the usual return and regular form. (See Pr. Tr. of Rec. pp. 41, 42). An affidavit for personal service out of the state was made as to those defendants who were non-residents of the State of Nebraska. (See Pr. Tr. of Rec. pp. 27, 28). The summons in each case where there was service on a non-resident was issued in the same form as those directed to the sheriff of Dakota County, except that in addition thereto it specifically described the tract of land intended to be included in the district, gave the purpose of the district and time for which it was to continue. The sheriff of Dakota County deputized an individual who served said summons personally upon the defendants mentioned and swore to his return, and this applies to each and every non-resident defendant not petitioning for the creation of the drainage district. (See Pr. Tr. pp. 29-33). On or about answer day a number of persons who refused to consent to the formation of the district appeared in the District Court of Dakota County, Nebraska, and filed their objections to the formation of the district, raising the question of the constitutionality of the statute, the legality of the proceedings and the physical condition of the land owned by the objectors, that is, whether it would be benefited by the drainage proposed. (See Ex. 10, Pr. Tr. of Rec. pp. 43-45). The law questions raised by the objectors were presented to the court and overruled, and thereafter, several days were taken in the introduction of evidence as to physical conditions. After such hearing the court found the facts necessary to the incorporation of the district in favor of the petitioners and the same was thereupon declared a corporation. (See Ex. 15 and Ex. 17, Pr. Tr. of Rec. pp. 50-53). A copy of all the proceedings, including the articles of incorporation, service of process, objections, various orders of the court, including the final journal entry, duly certified to by the Clerk of the District Court, was filed in the office of the Secretary of State of Nebraska and the same kind of a record with a map of the district was filed in the office of the county clerk of Dakota County, Nebraska, both being done within twenty days after the order of the district court find-

ing for the petitioners and declaring a corporation organized. (See Ex. 26 and Admission, Pr. Tr. of Rec. p. 61). The plaintiffs did not and do not reside within the proposed drainage district and own no property within the district and were not made parties to or served with notice of the action taken to organize the district. (Par. 6 pltf. petition, Pr. Tr. of Rec. p. 3 and 52). The Clerk of the District Court thereupon made a call for a meeting of the owners of real estate situated in said district, fixing the 27th day of November, 1909, as the time and the court room in the court house in Dakota City, (that being the county seat of Dakota County) as the place, to hold an election to elect supervisors of said drainage district. (Ex. 18, Pr. Tr. of Rec. p. 53). Said call was served upon the owners as required by the terms of the statute. (Ex. 20, 21, 22, 23 and 24, Pr. Tr. pp. 54-60). There were present at said meeting sixty of the owners in person; there were present at said meeting by proxies twenty-five; there remained thirty-four of the owners, (included therein are all minors who are owners, thirteen in number), who were not present. Guardians for six minors petitioned for and consented to the organization of the district and took part in the election. (See Ex. 28, Pr. Tr. pp. 62-64). The defendants, excepting therefrom Fred Bartels and adding thereto Daniel Hartnett, were elected as supervisors of the district. Later on Daniel Hartnett resigned as supervisor, the defendant Fred Bartels was appointed supervisor until the next election, at which time he was elected to the term made vacant by the resignation of Daniel Hartnett. (Pr. Tr. of Rec. 64). A partnership composed of Roy Towl and Harry Nelson and called "The Towl Engineering Company," was employed as the engineers for said district. (Pr. Tr. p. 66), and prepared a plan such as is required by Section 6247, Comp. Stat. (Section 5569, Cobbey's Annotated Statutes (Ed. 1909), including all details therein mentioned. This was presented to and filed by the board of supervisors, and after a slight change in the gradient of the ditch, was adopted, the line of the ditch being as is shown on both the exhibits of the plaintiffs and the exhibits of the defendants. (See Ex. 35 in orig. Record of Pr. Tr. of Rec., pp. 67-69.) The assessments of benefits having been made and approved practically as made,

and the defendants being unable to agree with Henry W. O'Neill, Cornelius K. Heffernan, the plaintiffs, and others, as to the amount of damage and compensation for right of way through their lands for said ditch, a petition was filed by the defendants as supervisors of the drainage district, with the county judge of Dakota County, Nebraska, asking the appointment of appraisers to fix such damage and compensation, describing therein the line of ditch, the property through which it ran, the description of each tract, the owner thereof and the amount of land taken. (See Pr. Tr. of Rec. p. 69 and pp. 71-73.) The appraisers were appointed, notified, took the oath of office, and after notice served on all of the owners, including the appellants or plaintiffs, proceeded to the performance of their duties in the assessment of damages and compensation. (See Exs. 40, 41, 42 and 45, Pr. Tr., pp. 74-76 and 80-83). The plaintiffs were present and participated in the proceedings. (See Ev. H. C. Hansen, pp. 150-1, Ev. Henry O'Neill, p. 151, Ev. Beacom, p. 149). From this award none of the appellants or plaintiffs appealed. Contracts were then let for the construction of the ditch.

## HISTORY OF THIS ACTION.

January 16th, 1911, this action was commenced by the plaintiffs and Elizabeth Leahey.

The plaintiffs in their petition, aver that the defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota County, Nebraska, and have no lawful authority or right whatever under the Constitution of the State of Nebraska and the Constitution of the United States of America to invade the plaintiff's said lands herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk Creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof, and that to permit them to do so would be a violation of Section 21, Article 1 of the Constitution of the State of Nebraska which provides that: "The property of no person shall be taken or damaged for public use without just compensation therefor," and of Section 1, Article 14 of the United States of America, which provides that: "No state shall make or enforce any law which shall abridge the privileges of immunities of citi-

zens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." (See Par. 15 Pltfs'. Pet., Pr. Tr. p. 6.)

On an ex parte hearing, the county judge of Dakota County, Nebraska, granted a temporary injunction enjoining the defendants from entering upon the lands of the plaintiffs and from constructing or having constructed the proposed ditch. A motion to dissolve the injunction was filed by the defendants. Upon giving an additional bond the hearing on the motion was postponed until the adjourned term of the court, at which time the case was submitted upon the motion to dissolve and upon the issues made by the pleadings. On February 12, 1912, the court handed down its decision finding generally and specially for the defendants, except as to the plaintiff, Elizabeth Leahey, and dissolved the injunction. (See Pr. Tr. pp. 18-22). (During the trial the defendants had disclaimed any right to enter upon the land of Elizabeth Leahey until that right had been acquired either by contract or by condemnation proceedings). (See Pr. Tr. of Rec., p. 105). From this decree the plaintiffs appealed to the Supreme Court of the State of Nebraska. This decree was in all things affirmed by the Supreme Court of the State on May 17, 1913. From this judgment of affirmance the appellants prosecute error. The plaintiffs assign thirty-three alleged errors. (See Pr. Tr pp. 162-170).

The only attempt by the plaintiffs in the trial court to raise a Federal question is found in paragraphs 15 and 16 of their petition which are as follows:

"15. The plaintiffs aver that the said defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota County, Nebraska, and have no lawful authority or right whatever under the Constitution of the State of Nebraska and the Constitution of the United States of America to invade the plaintiffs' said lands herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk Creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof, and that to permit them to do so would be a violation of Section 21,

Article 1 of the Constitution of the State of Nebraska, which provides that: 'The property of no person shall be taken or damaged for public use without just compensation therefor,' and of Section 1, Article 14 of the United States of America which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' "

"16. The plaintiffs aver that the single object and purpose of the defendants in what they intend and threaten to do as herein alleged, is wholly private and in the exclusive pecuniary interest of the so-called corporators of said alleged Drainage District No. 2 of Dakota County, Nebraska, including the defendants, and that said alleged Drainage District No. 2 of Dakota County, Nebraska, has no public character or function whatever and does not pretend to have any authority other than that which is strictly private and its alleged incorporation was and is for the exclusive purpose of enabling the defendants and their associates to accomplish in aggregate capacity what the respective individuals thereof could not do, that is, to take the private property of other private citizens, including the plaintiffs herein, for strictly private uses and purposes and for their own individual benefit in violation of the Constitution of the State of Nebraska and of the Constitution of the United States of America." And in paragraph 3 of their reply, which is as follows:

"And these plaintiffs further replying to said answer aver that sections 14, 15, 16 and 17 of the Act of the Legislature of the State of Nebraska, for the year 1905, entitled, 'An Act for the Organization and Government of Drainage Districts, Etc.,' approved March 29, 1905, are unconstitutional and void under the provisions of the Constitution of the State of Nebraska set out and copied in paragraph two hereof, and of section 1 of the 14th amendment to the Constitution of the United States of America in so far as section 14 of said act requires the plaintiffs or any of them or any other person to make an application in writing to the board of supervisors of Drainage District No. 2 of Da-

kota County, Nebraska, for compensation and damages sustained by them or any of them by reason of any proceedings or steps taken or to be taken under said act, and in so far as said act or acts require the said plaintiffs or any of them or any other person to file any objections which they may have to the proposed assessment shown or required to be shown by the notice provided for in section 13 of said first act by the estimate, plats and plans of the engineer as to the amount of the proposed assessment against their respective lands, etc., said section and each of said acts being incorporated herein and made a part of this reply by reference. And section 15 of said first act is unconstitutional and void under the provisions of the Constitution of the State of Nebraska herein set out and of section 1 of the 14th amendment to the Constitution of the United States of America, in so far as it confers or attempts to confer authority upon the board of supervisors of Drainage District No. 2 of Dakota County, Nebraska, the power or authority to hear and determine whether the requisite notices have been given as required by said act and if they find that due notice has not been given to continue the hearing on any claim or claims that may be filed before them or that an owner of any property sought to be taken may have contemplated by section 14 of said act, to a date to be fixed by them and to order notices to be served on the plaintiffs or on any of them as provided in said act, and when they find that due notice has been given authorizing or conferring upon them power to proceed to hear any objection or objections which may be filed as in said act provided in all claims for damages and other matters upon which issue has been made may be made as provided in sections 13 and 14 of said first act, and conferring upon them power to subpoena, swear and examine witnesses and to do all other matters necessary and incidental to a proper hearing of said issues or to exercise any judicial functions whatever, etc., because the same usurps and trenches upon the province of the established judiciary of the State of Nebraska, and is in violation of section 1, article 6 of the Constitution of Nebraska, which reads as follows: 'The judicial power of this state shall be vested in the supreme court, district courts, county courts,

justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by the law for cities and incorporated towns,' in that said Drainage District No. 2 and said board of supervisors are not and cannot by statute be made a judicial tribunal and have not and cannot under the Constitution of the State of Nebraska exercise any judicial authority or power over the rights or property of the plaintiffs or of any of them or of any other person or persons. And the said sections of said acts are in violation of section 1 of the 14th amendment of the Constitution of the United States of America, which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' as said sections of said acts as well as said entire acts abridge the privileges and immunities of the plaintiffs and of each of them, who are and at all times heretofore have been citizens of the United States, and deprive them and each of them of their property without due process of law and deny to them and to each of them the equal protection of the laws."

In the supreme court of Nebraska the appellants' only attempt to raise or present a federal question is the plaintiffs' third assignment and is found on page 16 of their principal brief and is as follows:

"The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernann, assign as error the judgment of the district court in holding Drainage District No. 2 to be a corporation, as in violation of section 1 of the 14th amendment of the Constitution of the United States." (See 3rd assignment of error in State Supreme Court, Pr. Tr. p. 179).

The argument in support thereof is on pages 16 and 17 of the brief and, omitting the plaintiffs' statement of fact, is as follows:

"Our contention is that section 1 of the 14th amendment to the Constitution of the United States protects all persons in the freedom of contract, which means not only the right to contract, but to refuse to contract; and that it

is not within the power of the legislature under any guise or in any form, to authorize the district court to enter a decree over their protest forcing them to consent to the incorporation of their property in a drainage district and to bear the burden and liability of such an organization. A clearer form of peonage or slavery could scarcely be imagined. And here again we are forcibly reminded that safety to persons and property is found only in a conscientious adherence to fundamental principles. This contention is so highly elementary that we cite no authority in its support."

The statutes of Nebraska provide as follows with reference to an appeal from the district court to the Supreme Court of the state:

Sec. 7265 Comp. Stat. (Ed. 1911) (Code Sec. 675).

"PROCEEDINGS TO OBTAIN REVERSAL.

"The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the Supreme Court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for a new trial in said cause; the filing of such transcript shall confer jurisdiction in such cause upon the Supreme Court."

History.—Laws 1907, ch. 162, p. 495, sec. 1; in force August 1.

Sec. 7265b Comp. Stat. (Ed. 1911) (Code Sec. 675b).

"NOTICE OF APPEAL.

"It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within ninety days after the rendition thereof, a notice of intention to prosecute such appeal, signed by the appellant or appellants or his or their attorney of record, but if such notice is not given the Supreme Court may provide by rule for notice after

the appeal is lodged in that court."

History.—Laws 1907, ch. 162, p. 496, sec. 3; in force August 1.

Sec. 7265c Comp. Stat. (Ed. 1911) (Code Sec. 675c).

"BRIEFS.

"The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief."

History.—Laws 1907, ch. 162, p. 496, sec. 4; in force August 1.

The defendants have filed their motion to "dismiss and affirm" and this motion is now before the court.

STATE OF NEBRASKA,
County of Dakota.
*ss.*

Robert E. Evans, being first duly sworn on his oath, deposes and says that he is one of the attorneys for the defendants in error and that he has been connected with this litigation ever since it was commenced in the district court of Dakota County, Nebraska; that he has assisted in the preparation of the foregoing statement and that the facts therein set forth are true and that the provisions of the State Constitution and the State Statutes hereinbefore quoted are correctly set forth.

R. E. Evans

Sworn to before me and subscribed in my presence by the said Robert E. Evans this 23rd day of March, A. D. 1914.

Sidney F. Evans

Notary Public for Dakota County, Nebraska.

## ARGUMENT.

In presenting this motion the defendants in error contend:

I.

*The drainage statute does not violate the State Constitution and assignments alleging that it does present no federal question.*

II.

*The organization of the district conforms to the construction placed upon the statute by the state courts and assignments alleging otherwise present no federal question.*

III.

*Whether a lawfully organized drainage district under the laws of Nebraska has the authority to exercise the right of eminent domain depends upon the state statute and state decisions and does not present a federal question and was not raised in the state court.*

IV.

*That the errors assigned as to the condemnation proceedings present no federal question and were not raised in the state court.*

V.

*The assignments that the line of the ditch was not distinctly marked and that no attempt to settle with the plaintiffs was made were decided by the state courts against the plaintiffs both as to the facts and to the law and present no federal question and such questions were not raised in the State Supreme Court.*

VI.

*There is nothing in the proceedings by which the right of way was condemned which violates the provision of the Federal Constitution and its Amendments and this is a collateral attack and the question was not raised in the state court.*

VII.

*The motion to dismiss and affirm should be sustained because no federal questions were presented and decided in the lower court. The errors assigned are frivolous and the writ of error is only for delay. This court has no jurisdiction.*

The 1, 2, 3, 22, 25 and 29th assignments of error made

by the plaintiffs, in general terms, assign as error the rendering of the judgment against them in the trial court and its affirmance by the Supreme Court of Nebraska or both.

Assignments 4, 5, 6, 7, 9, 11, 13 and 15 assign errors in that the judgment is in violation of section 1 of the 14th amendment of the Constitution of the United States.

Assignment 8 alleges error in that the judgment violates section 4 of Article IV of the Constitution of the United States.

Assignment 23 alleges error in that the judgment of the court violates section 1 of the 15th Amendment of the Constitution of the United States.

Assignments 8, 10 and 23 also relate to alleged violation of the provisions of the Constitution of the State of Nebraska.

Assignments 22, 25, 27 and 28 allege that the condemnation proceedings are insufficient.

Assignments 14, 16, 17, 18 and 21 allege error because the line of the proposed ditch was not properly located or that a settlement was not attempted with the plaintiffs or both.

Assignments 7, 12, 13 and 19 allege error in the holdings of the state courts that a portion of the lands of the plaintiff Henry W. O'Neill could be permanently submerged. No such holding was made by the state courts.

Assignment 32 is that there were not sufficient petitioners to support the finding for the organization of the district.

Assignments 4, 5, 15, 27, 30 and 31 allege errors to the effect that the drainage district is not a public corporation and that it did not have a right to condemn under the law of eminent domain. (See Pr. Tr., pp. 162-172.)

We shall attempt in a brief way to satisfy this court by reference to the record and decisions of the Supreme Court of Nebraska, that all of the requirements of the statutes of the State of Nebraska have been complied with and that after examination the state courts have approved the acts of the district's officers.

The plaintiffs-in-error have assigned thirty-three alleged errors. A number are general. Many of them are repetitions. A number are alleged errors of the state court in

passing upon the constitutionality of the law under which the district was organized, or of some of its provisions under the state constitution. A number are errors alleged to have been made in the interpretation of state statutes. Those alleging violation of the Constitution of the United States, or which attempt to present a federal question, are the 4, 5, 6, 7, 9, 11, 13 and 15, which complain of violation of section 1 of the 14th amendment to the Constitution; the 8th, which complains of a violation of section 4 of Article IV of the Constitution, and the 24th, which complains of a violation of section 1 of the 15th Amendment to the Constitution.

## I.

## THE DRAINAGE STATUTE DOES NOT VIOLATE THE STATE CONSTITUTION AND ASSIGNMENTS ALLEGING THAT IT DOES PRESENT NO FEDERAL QUESTION.

(Assignments 8, 9, 10, 11, 23 and 24.)

The particular act (Peabody) attacked in this action has been before the Supreme Court of Nebraska on a number of occasions. It has been held constitutional in the following cases:

Neal vs. Van Sickel, 72 Neb., 105.

Drainage District No. 1 vs. Richardson Co., 86 Neb., 355-366.

State vs. Hanson, 80 Neb., 724-728.

Barnes vs. Minor, 80 Neb., 189, 191-2, and in this case as to all questions presented therein.

O'Neill et al vs. Leamer et al, 93 Neb., 786-791. (Pr. Tr., 155-9.)

In 1904 the case of Neal vs. Van. Sickel (supra), section 14 of the Act of 1903 (Cobbey (Ed. 1903) 6256), was held unconstitutional by the state court because under its provisions the assessment against the land might exceed the benefits. This was held not to vitiate the entire act as it was held not indispensable. It was remedied by an amendment which removed this objectionable feature in 1909. (Laws of Nebraska 1909, Chap. 147, sections 3, 4 and 5, being sections 5569, 5573, 5574 and 5575 Cobbey (Ed. 1909) and sec-

tions 6247, 6251, 6252 and 6253 Comp. Stat. (Ed. 1909.) (See statement, pp. 6-8-10-14.) There has been no change in that portion of the law since. And in its present form it was aproved in Drainage District No. 1 of Richardson Co. vs. Richardson Co., supra.

Assignments 4, 5, 15, 27, 30 and 31 assign as error the holding by the state court that the purpose of the district is a public one and that the district is a public corporation. The state court has not only so held in this case, but as to other districts organized under the same law it has always held such districts to be public corporations.

Neal vs. Van Sickel, 72 Neb., 105-8.

Drainage District No. 1 vs. Richardson Co., 86 Neb., 355-7.

O'Neill et al vs. Leamer et al, 93 Neb., 786, 787-9. (Pr. Tr., 155-9.)

In assignments 5, 6, 8, 10 and 15 the finding of certain facts in the organization proceedings and the declaration by the district court of the organization of the drainage district as a corporation are assigned as error and it is insisted that it is in violation of the provisions of the State Constitution. The finding and judgment of the state court as to the proceedings are conclusive. This act had been attacked on the constitutional grounds with reference to the procedure and was sustained in the following cases:

Neal vs. Van Sickel, 72 Neb., 105, 106.

Barnes vs. Minor, 80 Neb., 189, 191-2.

Drainage Dist. No. 1 vs. Richardson Co., 86 Neb., 355, 363-4.

It follows that under the decisions of the state court such a corporation is public in its nature; that its object or purpose is one in which a considerable portion of the public is interested, and it is authorized to acquire rights-of-way under the power of eminent domain unless some of the provisions of the Constitution of the United States have been violated.

In this particular case the state court has decided that the procedure by which the district was brought into existence was in accordance with that statute and that it had authority to condmen a right-of-way over the land of the

plaintiffs upon the line located by the defendants. It also decided that proceedings by which the ditch right-of-way was acquired or condemned followed the statutory requirements and were sufficient.

O'Neill et al vs. Leamer et al, 93 Neb., 786, 789-791. (Pr. Tr., 155-9.)

The assignments (8, 9, 10, 11, 23 and 24), that the act of the legislature of Nebraska under which this drainage district was organized is in violation of the Constitution of Nebraska, where the supreme court of that state has held it constitutional, present no federal question.

Layton vs. State of Missouri, 187 U. S., 356; 47 L. Ed., 214; 23 S. Ct., 137.

Medberry vs. Ohio, 65 U. S. (How.), 413; 16 L. Ed., 739.

Porter vs. Foley, 65 U. S. (How.), 415; 16 L. Ed. 740.

Congdon vs. Goodman, 67 U. S. (2 Black), 574; 17 L. Ed. 257.

Withers vs. Buckley, 61 U. S. (20 How.), 84; 15 L. Ed. 816.

Jackson vs. Lamphire, 28 U. S. (3 Pet.), 280; 7 L. Ed. 679.

Barbier vs. Connolly, 113 U. S., 27; 28 L. Ed., 923; 5 S. Ct., 357.

Leeper vs. Texas, 139 U. S., 462; 35 L. Ed., 225; 11 Sup. Ct., 577.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112; 41 L. Ed., 369; 17 Ct., 56.

And such decision when made by the State Court is conclusive on the Federal courts.

Rasmussen vs. State of Idaho, 181 U. S., 198; 45 L. Ed., 820; 21 S. Ct., 594,

Mobile Transportation Co. vs. City of Mobile, 187 U. S., 479; 47 L. Ed., 266; 23 S. Ct., 170.

Carstairs vs. Cochran, 193 U. S., 10; 48 L. Ed., 596; 24 S. Ct., 318.

Brown vs. State of New Jersey, 175 U. S., 172; 44 L. Ed., 119; 20 S. Ct., 77.

Merchants & Manufacturers' Bank vs. Common-

wealth of Pennsylvania, 167 U. S., 461; 42 L. Ed., 236; 17 S. Ct., 829.

Sanford vs. Poe, 165 U. S., 194; 41 L. Ed., 683; 17 S. Ct., 305.

McCain vs. City of Des Moines, 174 U. S., 168; 42 L. Ed., 936.

Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; 17 S. Ct., 718.

N. Y. & N. E. R. Co. vs. Town of Bristol, 151 U. S., 556; 38 L. Ed., 269; 14 S. Ct., 437.

Hallinger vs. Davis, 146 U. S., 314; 36 L. Ed., 986; 13 S. Ct., 105.

In order that the question raised shall be a Federal question it must be that the state statute violates the Constitution of the United States.

Satterlee vs. Matthewson, 26 U. S. (2 Pet.), 380; 7 L. Ed., 457.

This requires this Court to hold that such assignments as base the alleged error on the unconstitutionality of the act under the provision of the State Constitution present no Federal question.

II.

THE ORGANIZATION OF THE DISTRICT CONFORMS TO THE CONSTRUCTION PLACED UPON THE STATUTE BY THE STATE COURTS AND ASSIGNMENTS ALLEGING OTHERWISE PRESENT NO FEDERAL QUESTION.

In plaintiff's assignments of error numbered 15, 23, 24, 27, 31, 32, 33 and inferentially in others the fact of the regularity of the organization of the drainage district is questioned.

In a contested case before the district court of Dakota County the findings required by the statute under which the proceedings was had, were made and no appeal taken. Evidence is preserved in the bill of exceptions in this case sufficient to support the findings if the degree of proof required were 'beyond a reasonable doubt.' The records of the court covering that proceeding are in evidence in this action.

Hence, should the court so desire, it or any of its members may be satisfied as to the regularity of those proceedings.

The district court before whom the proceedings to organize the drainage district were had also tried this case. After the plaintiffs had proven all that they could that court found against them. The record so made has been affirmed in all things by the highest court of Nebraska. We then have the constitutionality of the statute under the state constitution affirmed and the course of procedure to organize the district, as it interprets that act of the legislature, approved by the highest court in the state.

It follows that those assignments (23, 24, 27, 32 and 33) which relate to or attack the regularity of the proceeding by which the drainage district was organized present no Federal question unless it be because of something other than a failure to comply with the statutory requirement in organizing.

Ordinarily the provisions of the Fourteenth Constitutional Amendment, relating to due process of law, does not apply where the legislature of a state has performed its duties by providing for proceedings which answer the constitutional requirement, and where the fault is either with the court or officers.

Storti vs. Commonwealth of Massachusetts, 183 U. S., 138; 46 L. Ed., 120; 22 S. Ct., 72.

The question of the constitutionality having been determined in the state court, whether the provisions of the statute have been complied with in a particular case or proceeding is a mixed question of law and fact and the finding of the state court in favor of the defendants is conclusive upon this Court as to the construction of the law and the existence of the fact.

Questions of fact once settled in the courts of the state are not subject to review in the Supreme Court of the United States on writ of error to a state court.

Waters Pierce Oil Co. vs. Texas, 212 U. S., 97.

Noble vs. Mitchell, 164 U. S., 367; 41 L. Ed., 472; 17 S. Ct., 110.

Chrisman vs. Miller, 197 U. S., 313; 49 L. Ed., 770; 25 S. Ct., 468.

Clipper Min. Co. vs. Eli Mining & Land Co., 194 U. S., 220; 48 L. Ed., 944; 24 S. Ct., 632.

Keokuk & H. Bridge Co. vs. People of State of Illinois, 175 U. S., 626; 44 L. Ed., 299.

Atchison, T. & S. F. R. Co. vs. Matthews, 174 U. S., 96; 43 L. Ed., 909; 19 S. Ct., 609.

Smiley vs. State of Kansas, 196 U. S., 447; 49 L. Ed., 546; 25 S. Ct., 289.

Egan vs. Hart, 165 U. S., 188; 41 L. Ed., 680; 17 S. Ct., 300.

Western Union Tel. Co. vs. Call Pub. Co., 181 U. S., 92; 45 L. Ed., 765; affirming judgment; 78 N. W., 519; 58 Neb., 192.

Jenkins vs. Neff, 186 U. S., 230; 46 L. Ed., 1140; 22 S. Ct., 905.

Thayer vs. Spratt, 189 U. S., 346; 47 L. Ed., 845; 23 S. Ct., 576.

McKay vs. Dillon, 45 U. S. (4 How.), 421, 11 L. Ed., 1038.

Telluride Power Transmission Co. vs. Rio Grande W. Ry. Co., 187 U. S., 569; 47 L. Ed., 307; 23 S. Ct., 178.

A decision of the highest court of the state, made on the settled pre-existing rules of general jurisprudence of the state, cannot be brought to the Supreme Court of the United States under Judiciary Act Sec. 25.

Bank of West Tennessee vs. Citizens' Bank of Louisiana, 80 U. S. (14 Wall.), 9, 20 L. Ed., 514.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

French vs. Taylor, 199 U. S., 274; 50 L. Ed., 189; 26 S. Ct., 76.

The Supreme Court of the United States has no jurisdiction, under section 25 of the Judiciary Act, of a case brought up from the highest court of a state, on the record of which it appears that the decision of the state court turned

upon the construction, and not upon the validity, of the statute of a state.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

State courts have sole jurisdiction, in cases which turn entirely on the validity or interpretation of state laws, and this court has no appellate power over their judgments.

Congdon vs. Goodman, 67 U. S. (2 Black), 574; 17 L. Ed., 257.

Decisions of a state court of last resort construing a state statute will be followed by United States courts.

Tullis vs. Lake Erie & W. R. Co., 175 U. S., 348; 44 L. Ed., 192; 20 S. Ct., 136.

Missouri, K. & T. Ry. Co. vs. McCann, 174 U. S., 580; 43 L. Ed., 1093; 19 S. Ct., 755.

Yazoo & M. V. R. Co. vs. Adams, 181 U. S., 580; 45 L. Ed., 1011; 21 S. Ct., 729.

The construction of a statute by the highest court of the state forms a rule of decision for the Federal court.

McKeen vs. Delancy's Lessee, 9 U. S. (5 Cranch), 22; 3 L. Ed., 25.

Polk vs. Wendal, 13 U. S. (9 Cranch), 87; 3 L. Ed., 665.

Thatcher vs. Powell, 19 U. S. (6 Wheat.), 119; L. Ed., 221.

Elmendorph vs. Taylor, 23 U. S. (10 Wheat.), 152; 6 L. Ed., 289.

McCormick vs. Sullivan, 23 U. S. (10 Wheat.), 192; 6 L. Ed., 300.

Bell vs. Morrison, 26 U. S. (1 Pet.), 351; 7 L. Ed., 174.

D'Wolf vs. Rabaud, 26 U. S. (1 Pet.), 476; 7 L. Ed., 227.

Davis vs. Mason, 26 U. S. (1 Pet.), 503; 7 L. Ed., 239.

Waring vs. Jackson, 26 U. S. (1 Pet.), 570; 7 L. Ed., 266.

Fullerton vs. Bank of United States, 26 U. S. (1 Pet.), 604; 7 L. Ed., 280.

Ross vs. Barland, 26 U. S. (1 Pet.), 655; 7 L. Ed., 302.

Gardner vs. Collins, 27 U. S. (2 Pet.), 58; 7 L. Ed., 347.

Beach vs. Viles, 27 U. S. (2 Pet.), 675; 7 L. Ed., 559.

McCluny vs. Silliman, 28 U. S. (3 Pet.), 270; 7 L. Ed., 676.

United States vs. Morrison, 29 U. S. (4 Pet.), 124; 7 L. Ed., 804.

Henderson vs. Griffin, 30 U. S. (5 Pet.), 151; 8 L. Ed., 79.

Hinde vs. Vattier's Lessee, 30 U. S. (5 Pet.), 398; 8 L. Ed., 168.

Ross vs. McLung, 31 U. S. (6 Pet.), 283; 8 L. Ed., 400.

Green vs. Neal's Lessee, 31 U. S. (6 Pet.), 291; 8 L. Ed., 402.

Brashear vs. West, 32 U. S. (7 Pet.), 608; 8 L. Ed., 801.

Harpending vs. Dutch Church, 41 U. S. (16 Pet.), 455; 10 L. Ed., 1029.

Kinney vs. Clark, 43 U. S. (2 How.), 76; 11 L. Ed., 185.

Phalen vs. Virginia, 49 U. S. (8 How.), 163; 12 L. Ed., 1030.

Sumner vs. Hicks, 67 U. S. (2 Black), 532; 17 L. Ed., 355.

Leffingwell vs. Warren, 67 U. S. (2 Black), 599; 17 L. Ed., 261.

City of Richmond vs. Smith, 82 U. S. (15 Wall.), 429, 438; 21 L. Ed., 200.

Carroll County Sup'rs vs. United States, 85 U. S. (18 Wall.), 71; 21 L. Ed., 771.

Aicardi vs. Alabama, 86 U. S. (19 Wall.), 635; 22 L. Ed., 215.

State Railroad-Tax Cases, 92 U. S., 575; 23 L. Ed., 663.

Meister vs. Moore, 96 U. S., 76; 24 L. Ed., 826.

Davie vs. Briggs, 97 U. S., 628; 24 L. Ed., 1086.

Leeper vs. State of Texas, 139 U. S., 462; 35 L. Ed., 225, 11 Sup. Ct., 577.

New York, L. E. & W. R. Co. vs. Pennsylvania, 158

U. S., 431; 39 L. Ed., 1043; 15 Sup. Ct., 896.

The established rule is that the Federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself.

Olcott vs. Fond du Lac County, Fed. Cas. No. 10,479; 2 Bliss. 368, 4 Am. Law T. Rep., U. S. Cts., 47.

The state has full control over procedure in its courts subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

Maxwell vs. Dow, 176 U. S., 581, 605; 44 L. Ed., 597, 606.

When the question is whether, under the constitution and laws of a state, a company is legally organized as a corporation, the decision of the supreme court of the state settling the question in the affirmative will be accepted as conclusive.

Secombe vs. Milwaukee & St. P. R. Co., 90 U. S. (23 Wall.), 108; 23 L. Ed., 67.

Mooney vs. Humphrey, 12 Fed., 612.

Fitzgerald vs. Missouri Pac. Ry. Co., 45 Fed., 812.

It follows that no Federal question is presented by either the construction of the statute or in the finding as to whether or not its provisions have been complied with in the proceeding resulting in the organization of the drainage district.

## III.

## WHETHER A LAWFULLY ORGANIZED DRAINAGE DISTRICT UNDER THE LAWS OF NEBRASKA HAS THE AUTHORITY TO EXERCISE THE RIGHT OF EMINENT DOMAIN DEPENDS UPON THE STATE STATUTES AND STATE DECISIONS AND DOES NOT PRESENT A FEDERAL QUESTION.

(Assignments 4, 5, 15, 27, 30 and 31.)

The purpose for which property is taken under the right of eminent domain must be a public one. In no state has the

drainage of large tracts of land been held to be a private use or purpose.

In every state where it has been passed upon it has been declared public.

In the following cases this Court has so decided.

Hagar vs. Reclamation Dist. No. 108, 111 U. S., 701, 705; 28 L. Ed., 569.

Willson vs. Blackbird Creek Marsh Co., 27 U. S., 245 (2 Pet., 245, 252); 7 L. Ed., 412.

Wurts vs. Hoagland, 114 U. S., 609, 612; 29 L. Ed., 229.

609, 612; 29 L. Ed., 229.

Mugler vs. Kansas, 123 U. S., 623; 31 L. Ed., 205.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 173-5; 41 L. Ed., 369, 390-1.

Sweet vs. Rechel, 159 U. S., 380; 40 L. Ed., 188.

C. B. & Q. Ry. Co. vs. Illinois, 200 U. S., 561, 585-6.

We quote from the opinion in the latter case, from pages 585-6. The Court says: "We assume that the drainage statute in question is entirely consistent with the constitution of Illinois. It is so regarded by the Supreme Court of the State, and that is all sufficient in this case. We assume also, without discussion—as from the decisions of the State court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the state may by appropriate agencies exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the State Court has said and by the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and commerce of the state. Their value is increased and thereby their contribution in taxes to the state and local governments is increased."

C. B. & Q. Ry. Co. vs. Illinois, 212 Ill., 103, 119.

It is conceded that this public purpose cannot be certainly and effective attained except through the plan adopted by the Drainage Commission."

The district in the Illinois case contained but 2,000 acres while 7,000 acres are to be drained by the district whose pur-

pose is attacked in this action.

The United States Supreme Court has no jurisdiction to review the judgment of a state court in a case when the sole question is whether the corporation is acting beyond the authority conferred on it by the state legislature.

Michigan C. R. Co. vs. Michigan S. R. Co., 60 U. S. (19 How.), 378; 15 L. Ed., 689.

And this rule applies to decisions construing statutes which determine the extent of the powers and liabilities of corporations created under such statutes.

Sioux City Terminal Railroad & Warehouse Co. vs. Trust Co. of N. America, 173 U. S., 99; 43 L. Ed., 628, 19 S. Ct., 341.

Schofield vs. Goodrich Bros. Banking Co., 39 C. C. A., 76; 98 F., 271.

Consumers Gas Trust Co. vs. Quinby, 70 C. C. A., 220; 137 F., 882.

Blaylock vs. Incorporated Town of Muskogee, 54 C. C. A., 639; 117 F., 125.

Forsyth vs. City of Hammond, 166 U. S., 506; 41 L. Ed., 1095.

Where the question is not as to the validity of the Constitution or act, but merely to the application of the same to the case, no Federal question is involved.

Cameron vs. United States, 146 U. S., 533.

Assignments 12 and 30 allege error in the decision of the state court approving the taking of the waters of Elk Creek before they had reached the submerged land and carry them to Jackson Lake. In the construction of the statute the Supreme Court of Nebraska decided that the district in this particular case had not exceeded its powers; that decision is conclusive. The facts are the ditch as proposed starts within the district and upon land it is proposed to drain and charged with a share of the expense. So long as the purpose is lawful and method within the statute as construed by the state court there is no error and this record shows the state court has decided against the plaintiffs and no Federal question is involved. (See authorities cited heretofore).

## IV.

## RIGHT OF WAY.

### THE ERRORS ASSIGNED AS TO THE CONDEMNATION PROCEEDINGS PRESENT NO FEDERAL QUESTION.

(Assignments 22, 25, 28 and 29.)

Where there is no constitutional provision prescribing the tribunal before which condemnation proceedings should be brought, the legislative power has authority to designate it.

Spring Valley Water Works vs. Schottler, 110 U. S., 347, 382; 28 L. Ed., 173.

United States vs. Jones, 109 U. S., 513, 519; 27 L. Ed., 1015.

One already in existence may be chosen or a special one may be created.

Id.

The Constitution of Nebraska not having created a tribunal before whom condemnation proceedings should be conducted, the legislature made it one of the duties of the county judge, upon application, to appoint disinterested freeholders as appraisers. (See statement, pp. 20 and 21, section 2031.) The defendants followed this course.

The statute providing for the condemnation of railway right of way has been before the Supreme Court of Nebraska for construction and that court has held that all persons interested in the land to be affected are owners and necessary parties.

State vs. Missouri Pac. R. Co., 75 Neb., 4, 9-10.

The same court has held that notice to the owners is necessary.

Trester vs. Missouri Pac. R. Co., 33 Neb., 171, 185.

The question of whether or not suffiicient notice has been given is one for the determination of the state court, when the action is brought under the state statute.

Baltimore Traction Co. vs. Baltimore Belt R. Co., 151 U. S., 137; 38 L. Ed., 102.

Hence this case so far as notice to the plaintiffs is con-

cerned presents no Federal question.

Here then is a tribunal legally constituted requiring the owner to be notified of the proceeding with the right of appeal and jury trial preserved. (See statement, pp. 18-24, sections 2015, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2041, 2042, 2043, and Constitution Provision on page 18.)

Not only this, but in the proceeding to condemn, the landowner may be heard before the county judge, not as to value, but as to other matters he may desire to litigate material to the condemnation.

F. E. & M. V. R. Co. vs. Mattheis, 30 Neb., 98, 101-102.

Having been notified the plaintiffs appeared and took part in the proceedings. (See Pr. Tr. pp. 149, 150-1).

They have had their day in court. They took their chance before the tribunal provided by the legislature and cannot now be heard to impeach its judgment.

*The Plaintiffs Had Notice.*

The 28th assignment is based, in part at least, upon the assumption that notice of the filing of the petition of the defendants under which the condemnation proceeding was prosecuted was given to the plaintiffs. This error is now for the first time specifically urged. It was never mentioned in the state courts.

Exhibit 45, Bill of Exceptions, Vol. 3, pages 175-187, (See Pr. Tr. pp. 80-83, 89-90), is the notice to the plaintiffs and others with the officer's return showing service upon the plaintiffs. It contains a description of each tract of land crossed, the width of the strip taken and the number of acres taken from the tract with the name of the owner. (See Appellant's Abstract in state court p. 44, and Appellees' "Additions, Changes and Corrections to Appellants' Abstract," in state court, pp. 64-5). It was offered and received in evidence in the trial court. (Bill of Exceptions, Vol. 1, p. 66).

The trial court and the supreme court of Nebraska found that the notice complied with the requirements of the state laws.

Unless the state law is in conflict with the Federal Constitution, (which we will consider later), no Federal question

is presented.

This Court will examine the act of the state legislature and determine whether it violates the Federal Constitution, an Act of Congress or a treaty and it may examine its application by the state court, but this court will go no further.

As we have shown, the plaintiffs were given their day in court before a legally constituted tribunal before which they had been duly summoned and before which they might have raised every question now presented.

Being a constitutional exercise of legislative power and providing a suitable remedy by trial in the regular course of justice to recover compensation for injury to the land of plaintiffs-in-error, it has not deprived them of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9, 26.
Walker vs. Sauvinet, 92 U. S., 90.
Davidson vs. New Orleans, 96 U. S., 97.
Hurtado vs. California, 110 U. S., 516.
Hagar vs. Reclamation Dist., 111 U. S., 701.

The decision by the state court that a particular formality is or is not essential under a state statute presents no Federal question, if the statute as thus construed is sufficient to provide due process of law.

Castillo vs. McConnico, 168 U. S., 674; 42 L. Ed., 622.

Because a statute might be construed so as to violate due process of law does not raise a Federal question. It must be applied so as to violate due process.

Id.

A decision that the advertisement was sufficient by state court is only on local law.

Id.

The mode of exercising the right of eminent domain, in the absence of any provision of organized law prescribing a contrary course, is within the discretion of the legislature.

*There is no limitation on the power of the legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken.*

Secombe vs. Railroad, 23 Wall., 108; 23 L. Ed., 67.

Backus vs. Fort Street Union Depot Co., 169 U. S., 557, 570; 42 L. Ed., 853.

C. B. & Q R. Co., vs. Chicago, 166 U. S., 226, 236; 41 L. Ed., 979.

V.

THE ASSIGNMENT THAT THE LINE OF THE DITCH WAS NOT DISTINCTLY MARKED AND THAT NO ATTEMPT TO SETTLE WITH PLAINTIFFS WAS MADE HAVE BEEN DECIDED AGAINST THE PLAINTIFFS BOTH AS TO THE FACTS AND TO THE LAW AND PRESENT NO FEDERAL QUESTION NOR WERE THEY RAISED IN THE STATE COURT AS SUCH.

The 14th, 16th, 17th, 18th and 21st assignments of error are based upon an alleged failure of the defendants, by their survey, to properly and definitely locate the line of the ditch; and a failure to endeavor to come to an agreement with the plaintiffs for the value of the right of way. Both of these matters relate to procedure under the state statute. It is a construction of a state statute by the courts of the state. The finding of fact in both instances as to whether the line was marked or the settlement attempted is against the plaintiffs. The trial court by its findings determined the fact of the location of the line as being sufficiently definite, (O'Neill et al., vs. Leamer et al., 93 Neb., 790-1, Pr. Tr. pp. 155-9), that it was a matter which must of necessity have been raised before the County Judge and that therefore, in this case, was a collateral attack on the procedure for that which was but a mere irregularity. (O'Neill et al., vs. Leamer et al., 93 Neb., 791, Pr. Tr. 155-9).

The same things are true of the alleged failure to come to an agreement with the plaintiffs as to the value of the land taken and damage suffered. (O'Neill et al., vs. Leamer et al., 93 Neb., 789, Pr. Tr. pp. 155-9).

The trial court having found against the plaintiffs both as to the facts and as to the course and procedure, it was presented with great detail to the Supreme Court of the State

of Nebraska and the trial court was in all things sustained. For four reasons then no Federal question is presented by either of these assignments so far as they relate to the location of the line or the course of procedure.

1. It being a question of fact and having been found in favor of the defendants that finding of fact is conclusive upon this court. (See Authorities heretofore cited.)

2. It being a matter of procedure as provided by the statute of the state, the interpretation of the state courts govern. (See Authorities heretofore cited.)

If the decision turned on the construction of the statute and not its validity there is no Federal question.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938, and other Authorities heretofore cited.

3. It having been a matter which could have been presented to the County Judge, the attack here made is a collateral one and so long as jurisdiction appears in the original procedure attacked, neither the state court nor this court can review it in a collateral proceeding. (See Authorities hereafter ~~before~~ cited.) *pp. 56-7)*

4. Neither of the alleged errors were presented or claimed in the state courts to be in violation of any provision of the Constitution of the United States or any Amendment thereof.

In order to bring a case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and decided in the court below.

Crowell vs. Randell, 35 U. S. (10 Pet.), 368; 9 L. Ed., 458.

Choteau vs. Marguerite, 37 U. S. (12 Pet.), 507; 9 L. Ed., 1174.

Coms vs. Gallagher, 40 U. S. (15 Pet.), 18; 10 L. Ed., 645.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

Maxwell vs. Newbold, 59 U. S. (18 How.), 511; 15 L. Ed., 506.

Hoyt vs. Shelden, 66 U. S. (1 Black), 518; 17 L. Ed., 65.

Taylor vs. Morton, 67 U. S. (2 Black), 481; 17 L. Ed., 277.

The Victory, 73 U. S. (6 Wall.), 382; 18 L. Ed., 848.

Gibson vs. Chouteau, 75 U. S. (8 Wall.), 314; 19 L. Ed., 317.

Cockroft vs. Vose, 81 U. S. (14 Wall.), 5; 20 L. Ed., 875.

Detroit City Ry. Co. vs. Guthard, 114 U. S., 133; 5 Sup. Ct., 811; 29 L. Ed., 118.

Kansas Endowment Ass'n vs. State of Kansas, 120 U. S., 103; 7 Sup. Ct., 499; 30 L. Ed., 593, and other authorities cited heretofore.

## VI.

## DUE PROCESS OF LAW.

**NEBRASKA'S CONSTITUTION PROVIDES NO TRIBUNAL TO FIX COMPENSATION AND RIGHTS UNDER THE LAW OF EMINENT DOMAIN. THE LEGISLATURE HAS PROVIDED SUCH A TRIBUNAL. THE ACT REQUIRES NOTICE TO THE PARTIES INTERESTED. (SEC. 2041.) A HEARING BEFORE THAT TRIBUNAL IS GUARANTEED. (SEC. 2131.) RIGHT OF APPEAL AND ON APPEAL TRIAL BY JURY IS SECURED. (SECS. 3032-6.) (STATEMENT HEREIN, PP. 18-24.) THIS CONSTITUTES DUE PROCESS OF LAW.**

The words "due process of law" are intended to convey the same meaning as the words "by the law of the land" in Magna Charta.

Murray vs. Hoboken Land Co., 59 U. S. (18 How.), 272; 15 L. Ed., 372.

The phrase "due process of law" refers to the State's own process.

In re Mahon, 34 Fed., 525.

The term "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass on their subject-matter; and, if that involves merely a determination of the personal liability of defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance.

Pennoyer vs. Neff, 95 U. S., 714; 24 L. Ed., 565.

Davidson vs. New Orleans, 96 U. S., 97, 105-6.

Due process of law is its regular administration, through the courts of justice, by a timely and regular course of proceedings to judgment and execution. As a rule it includes parties, regular pleadings and a trial, according to the settled course of proceedings.

Den vs. Hoboken, etc. Co., 59 U. S., XV. 273, 86 U. S., 72.

It does not require a trial by jury.

U. S. vs. Ferreira, 54 U. S., 40.

Jurisdiction of the subject mater is power to deal with general abstract questions in empowering the court to determine each issue within the scope of its authority according to its own view of the law and the evidence. Whether its decision is right or wrong each judgment or decision so rendered is final and conclusive upon the parties to it unless reviewed by writ of error or appeal or impeached for fraud.

Foltz vs. St. Louis & S F. Ry. Co., 60 Fed., 316, 318.

Insley vs. United States, 150 U. S., 512; 37 L. Ed., 1163.

Des Moines N. & R. Co. vs. Iowa Homestead Co., 123 U. S., 552; 37 L. Ed.

In re Sawyer, 124 U. S., 200.

The acts of a municipal corporation cannot be said to be wanting in the due process of law guaranteed by the Constitution of the United States or the Fourteenth Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment.

Owensboro Waterworks Co. vs. Owensboro, 200 U. S., 38; 50 L. Ed., 361; 26 S. Ct., 249.

Law in its regular course of administration through the courts of justice is due process and when secured by the law of the state the constitutional requirement is satisfied.

Leeper vs. State of Texas, 139 U. S., 462; 35 L. Ed., 225.

The state may provide that the decision of the appraiser in a condemnation proceeding, shall be final and it is due process of law.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685; 41 L. Ed., 1165.

Shoemaker vs. United States, 147 U. S., 282, 305; 37 L. Ed., 170.

Louisville, etc. R. Co. vs. Kentucky, 183 U. S., 503, 515; 46 L. Ed., 298.

In the exercise of the right of eminent domain inquiry as to the amount of compensation provided for in some appropriate way before some properly constituted tribunal, constitutes due process of law.

Backus vs. Ft. Street Union Depot Co., 169 U. S., 557, 568; 42 L. Ed., 853, 859.

*This is a Collateral Attack on the Condemnation Proceedings.*

(Assignment 26.)

The tribunal was legally constituted. The plaintiffs had notice and appeared before the appraisers or commissioners. They took the advantage of the opportunity offered them and did not appeal. In this action they can litigate no question which could have been decided in that proceeding. This is a collateral attack.

A judgment of condemnation of land for public purposes, rendered by a competent tribunal, is not open to collateral impeachment.

Secombe vs. M. & St. P. R. Co., 90 U. S. (23 Wall.), 108.

Huling vs. K. V. Ry. & Imp. Co., 130 U. S., 559.

Goodrich vs. City of Detroit, 184 U. S., 432.

A judgment rendered by a competent court charged with a special statutory jurisdiction, and when all the facts neces-

sary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. So HELD of a judgment condemning lands for uses of a railroad company.

Secombe vs. Milwaukee & St. P. R. Co., 90 U. S. (23 Wall.), 108; 23 L. Ed., 67.

A decision of a state court in a condemnation proceeding is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby or property taken without just compensation, when there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States or that any ruling involved a decision against a right set up under that instrument.

Hooker vs. City of Los Angeles, 188 U. S., 314; 47 L. Ed., 487.

In a suit to enjoin the taking of land you cannot question the irregularities in the condemnation proceedings.

F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 98.

Dettman vs. Pittenger, 89 Neb., 825.

The Supreme Court has no jurisdiction of an error to a State Court in condemnation proceedings, on the ground that the condemnation statute is repugnant to the Fourteenth Amendment, in that it fails to provide for notice, when the highest state court has already decided that the statute does require notice.

Baltimore Traction Co. vs. Baltimore Belt R. Co., 151 U. S., 137; 14 Sup. Ct., 294; 38 L. Ed., 102.

The decisions of the highest court of a state on questions of procedure in condemnation proceedings, or as to alleged conflicts between the statute authorizing them and the state constitution, are controlling on the Federal courts.

Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; 17 S. Ct., 718.

The defendants have thus considered the statute under which the district was organized so far as affected by the State Constitution and the status of the district and its proceeding under the state laws and constitution. For the purpose of the branch of the argument we are now entering upon

it will be assumed that if the district is not a corporation *de jure* that it has no right to exercise the right of eminent domain and in such case the right can be questioned in a collateral proceeding such as this.

The grounds upon which the plaintiffs claim that the statute under which the district was organized violates the Constitution of the United States are:

1. That it violates Section 4 of Article IV., which provides: "The United States shall guarantee to every state in this union a republican form of government." (Assignment 6).

2. That it violates Section 1 of the Fifteenth Amendment of the Constitution of the United States, which provides: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." (Assignment 23). And

3. That it violates Section 1 of the Fourteenth Amendment of the Constitution of the United States. (Assignments 4, 5 6, 7, 9, 11, 13, 15)

1.

## SECTION 4, ARTICLE IV, OF FEDERAL CONSTITUTION HAS NO APPLICATION TO THIS CASE.

There is nothing in the Constitution of the United States which forbids the legislature of the state or territory to exercise judicial functions.

Satterlee vs. Matthewson. 2 Pet., 380, 413; 7 L. Ed., 458, 469.

Baltimore & Susquehanna R. Co. vs. Nesbit, 10 How., 395, 400; 13 L. Ed., 469, 471.

Dreyer vs. Illinois, 187 U. S., 71, 83-4.

A corporation may be created in any manner that a state may see fit to adopt and when a state court decides that by certain legislation a corporation has been created it is binding upon the Supreme Court of the United States.

Hancock vs. Louisville, etc., R. Co., 145 U. S., 409; 36 L. Ed., 755.

Secombe vs. C. M. & St. P. R. Co., 23 Wall., 108; 23 L. Ed., 67, 69.

The creation of an entity with power to act as a corporation, although it is not so called, is sufficient.

Secombe vs. Railroad Co. (Supra).

In Soliah vs. Heskin, 222 U. S., 522, the court says:

"The Fourteenth Amendment does not deprive a state of the power to determine what duties may be performed by local officers, or whether they be appointed or elected by the people.

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under Section 4 of Article 4 of the Constitution of the United States are bound to guarantee to every state in this union. And whenever the Supreme Court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the Federal courts can neither deny the correctness of the construction nor repudiate its binding force as presenting anything in conflict with the Federal constitution.

"Forsyth vs. Hammond, 166 U. S., 506, 519."

"Neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution."

Davidson vs. New Orleans, 96 U. S., 97, 105-6.

2.

## FIFTEENTH AMENDMENT IS NOT VIOLATED.

*The statute under which this district was organized nowhere affects the "right of any person to vote because of race, color or previous condition of servitude," hence this assignment may be passed so far as its merit is concerned.*

Before passing to the third ground the defendants challenge the attention of the court to the failure of the plaintiffs to present either of the foregoing alleged errors in the state courts. A search of the record will disclose no reference to either.

To justify the United States Supreme Court in taking jurisdiction the Federal question must be specially set up or claimed in the state court; the party have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States and such intention must be declared in some unmistakable manner.

Keokuk, etc., Bridge Co. vs. Illinois, 175 U. S., 626; 44 L. Ed., 293.

Oxley Stave Co. vs. Butler Co., 166 U. S., 648; 41 L. Ed., 1149.

To give the Supreme Court jurisdiction of a writ of error to a state court, it must appear by the record that a Federal question was raised.

Inglee vs. Coolidge, 15 U. S. (2 Wheat.), 363; 4 L. Ed., 261.

Fisher vs. Cockerill, 30 U. S. (5 Pet.), 248; 8 L. Ed., 114.

Crawford vs. Branch Bank of Alabama, 48 U. S. (7 How.), 279; 12 L. Ed., 700.

Parmelee vs. Lawrence, 78 U. S. (11 Wall.), 36; 20 L. Ed., 48.

Brooks vs. Missouri, 124 U. S., 394; 8 Sup. Ct., 443; 31 L. Ed., 454.

Powell vs. Brunswick County,, 150 U. S., 433; 14 Sup. Ct., 166; 37 L. Ed., 1134.

Ansbro vs. United States, 159 U. S., 695; 16 Sup. Ct., 187; 40 L. Ed., 310.

Capital Nat. Bank vs. First Nat. Bank, 172 U. S., 425; 43 L. Ed., 502.

Phoenix Ins. Co. vs. Treasurer, 78 U. S. (11 Wall.), 204; 20 L. Ed., 112.

The Supreme Court has no jurisdiction to review the judgment of a state court on writ of error, unless it affrmatively appears from the record that a question giving the Supreme Court jurisdiction was made by the pleadings, and passed on by the court.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169.

Gray vs. Coan, 154 U. S., 589; 14 Sup. Ct., 1168; 38 L. Ed., 1088.

Chouteau vs. Gibson, 111 U. S., 200; 4 Sup. Ct., 340; 28 L. Ed., 400.

Sayward vs. Denny, 158 U. S., 180; 15 Sup. Ct., 777; 39 L. Ed., 941.

A Federal question not specifically set up or claimed in a state court cannot be considered on writ of error from Supreme Court of United States to State Court merely because another Federal question not connected with it was raised in the state court.

Keokuk & Hamilton Bridge Co. vs. Illinois, 175 U. S., 626; 44 L. Ed., 299.

Dewey vs. Des Moines, 173 U. S., 193; 43 L. Ed., 665.

3

FOURTEENTH AMENDMENT.

The plaintiffs claim the state court violated the Fourteenth Amendment in the following ways:

(a) In holding the district a public corporation. (Assignments 4, 5 and 6).

(b) In holding the district had the right to perpetually overflow Lot 5. (Asignments 7, 12, 13, 19 and 24).

(c) In holding that the creation of the district a corporation was a judicial power when it was a legislative power. (Assignment 9).

(d) In holding that sections 14, 15, 16, 17 of the drainage act are constitutional and valid when said sections are invalid in that they require the plaintiffs to make application in writing to the board for compensation and require the

plaintiffs to file objections to proposed assessments. (Assignment 11).

(e) In holding that Jackson lake is a body of public water and that the water of Elk Creek might be taken across the plaintiff's land to the lake and submerge the lands of plaintiff Henry W. O'Neill. (Assignments 13 and 19).

(f) In holding the district a legally organized corporation. (Assignment 15).

(a)

It has already been pointed out that the district is a corporation with public functions and the decisions of this court so holding have been cited, a number of the cases being drainage district cases.

In the case of Wurts vs. Hoagland, 114 U. S., 609; 29 L. Ed., 229, Justice Gray after reviewing the New Jersey case says:

"This review of the case clearly shows that general laws for the drainage of large tracts of swamp and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands held by various owners in severalty and in the improvement of which all have a common interest, but which by reason of the natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general Mill Acts in Head vs. Amoskeag Mfg. Co., 113 U. S., 9. The statute of 1871 is applicable to any tract of land within the state which is subject to overflow from freshets or which is usually in low, marshy, boggy or wet condition. It is only on the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have

opportunity by public notice to object to the appointment of commissioners to execute the plan and no commissioner can be appointed against the remonstrances of the owners of the greater part of the lands. All persons interested have also an opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

"As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the law, nor been deprived of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

(b) and (e).

(b) and (e) will be considered together, as they both relate to "Lot 5." The state courts did not hold that "Lot 5" of the plaintiff Henry W. O'Neill could be perpetually overflowed. The facts are Henry W. O'Neill owns no land north of the lake. He offered no competent proof of title to any such land; "Lot 5" does not extend north of the Jackson Lake. It is one of the tracts of land specifically described in the petition for condemnation; (Exhibit 39, Bill of Exceptions, Vol. 3, p. 156, Pr. Tr. pp. 71, 72-3); in the notice (Exhibit 45, Bill of Exceptions, Vol. 3, p. _____, Pr. Tr. pp. 80, 82), and the Report of the Appraisers (Exhibit 47, Bill of Exceptions, Vol. 3, p. _____, Pr. Tr. pp. 83, 84). In the latter $100.00 is fixed as the amount awarded to him as compensation for the land taken and as damages to what remained.

This award covers all damage incidental to that particular tract.

F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 100.

Under assignment 19 error is alleged because of failure to take the land of Elizabeth Leahey and the taking of the land of the plaintiff Henry W. O'Neill and thereby perpetually submerging it. An examination of the line of the pro-

posed ditch will disclose that the land of Elizabeth Leahey lies between that of Henry W. O'Neill and the place from which the water is to be taken so that until a right is secured through the land of Elizabeth Leahey it will be impossible to place a drop of water on any portion of the land of the plaintiff Henry W. O'Neill. The land of Elizabeth Leahey is in the Southeast Quarter of the Southeast Quarter of Section Twenty-five (25), Township Twenty-nine (29), Range Seven (7). The lands of Henry W. O'Neill are in Sections Twenty-eight (28) and Twenty-nine (29) of Township Twenty-nine (29), Range Eight (8). The waters will be taken from Section Thirty-five (35), Township Twenty-nine (29), Range Seven (7) and will empty into Jackson Lake at a point in the Southwest Quarter of Section Twenty-eight (28), Township Twenty-nine (29), Range Eight (8). The lowest point in the ditch bank or grade will be near the west line of Section Thirty-six (36), Township Twenty-nine (29), Range Seven (7), hence if the district were inclined to excavate the ditch in every place but in Elizabeth Leahey's land in said Section Twenty-five (25) the water would never reach Henry W. O'Neill or Jackson Lake, but would of necessity, when it would have filled the ditch, flow south over the land included within the district.

It was established on the trial that even the low land north of the lake would be submerged but to a slight extent even in times of floods in Elk Creek and that practically all of this land north of the lake was flooded when the Missouri river was at an ordinary high stage.

Be the facts as they may, so far as this case is concerned, the findings of the state courts on disputed facts were against the plaintiffs and in this court those findings will be respected. (See authorities already cited.)

The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on a writ of error to that court.

Hooker vs. City of Los Angeles, 188 U. S., 314; 47 L. Ed., 488; 63 L. R. A., 471.

We will discuss the headings (c) and (f) together.

(d).

Under assignments 11.

Sections 14, 15, 16 and 17 of the drainage act (being secs. 6252, 6253, 6254 and 6255, Comp. Stat., secs. 5574, 5575, 5576 Board of Supervisors of the district. We have already quoted these sections in full. (See pp. 12-14.) If the claims made by the plaintiffs as to this requirement were correct, for the reasons heretofore given, it would not violate the rule of due process of law. It is a procedure which requires notice and after a hearing the right of appeal. This under the doctrine declared by this court constitutes due process of law. A reading of section 14, referred to, will disclose, however, that reference is had only to "owners of property within the district" and that the objections to be filed are directed to the surveyor's report or any item thereof, and the classification or assessment of benefits to landowners. The other sections attacked provide the procedure for taxing of costs and an appeal from the decision made upon the hearing of the objections. It follows that the plaintiffs are in no way concerned or affected by the sections in question. The Supreme Court of the State has not applied the sections to the plaintiffs and it must be in the application of the law complained of that the plaintiffs are denied some right under the Fourteenth Amendment of the Constitution to give this court jurisdiction. The record of this case in the State Supreme Court will be searched in vain for any reference to these sections as unconstitutional. There was not even an assignment of error mentioning them. (See Pr. Tr. pp. 179-180).

(c) and (f).

Assignments 9 and 15 allege violations of the Fourteenth Amendment in holding that the district is a public corporation legally organized.

It has been shown that the purpose, as viewed by both State and Federal courts is a public one. The Supreme Court of the State has held that it was a legally organized public corporation. (O'Neill et al. vs. Leamer et al, 93 Neb., 786;

Pr. Tr. pp. 155-9).

It is claimed, however, that the procedure by which it was organized was not "due process of law" in that upon the district court was placed a legislative function.

The district court under the act complained of and under which the district was organized has one function—that of determining the existence or non-existence of certain facts. When the existence of these facts has been determined the legislative declaration creates the corporation.

The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act and such act does not violate the Fourteenth Amendment of the Constitution.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 178; 41 L. Ed., 369, 395.

While this case concerned an irrigation district it was considered, so far as the questions involved were concerned, as of the same character as a drainage district. (See opinion pages 173-5. L. Ed., 390-1).

"Neither the United States Constitution nor its Amendments were designed to interfere with the power of the state, sometimes termed its police power, to prescribe rgulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having this object in view, must often be had in certain districts, such as for the draining of marshes and irrigating arid plains. Regulations for these purposes may press with more or less weight upon one than upon the other, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good."

Barbier vs. Connolly, 113 U. S., 27; 28 L. Ed., 923; 5 Sup. Ct., Rep. 357.

It is thoroughly established in the Supreme Court of the United States that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contract or the deprivation of property without due process or

unequal protection of the laws by states are not violated by the exercise of legislative power in securing public safety, health and morals.

New York & N. E. R. Co. vs. The Town of Bristol, 151 U. S., 556, 567, 571; 38 L. Ed., 269, 272-3, 274.

There is not a theory of this case upon which this court might review any of the matters presented by the plaintiff's petition. If the district were so defectively organized as not to be a corporation *de jure* then it might not be authorized to exercise the right of eminent domain. We have shown by the record in this case and the decisions of the state court and the decision of this court that the corporation is a corporation de jure. Hence, no Federal question is in this case.

A decision holding constitutional an alleged delegation of legislative power to a building commission presents no Federal question on a writ of error to the State Supreme Court.

Welch vs. Swasey, 214 U. S., 91; 53 L. Ed., 923.

It is apparent that the state court of last resort has considered the statutes attacked in this action and has decided that the provisions of the State Constitution have not been violated. The same tribunal has construed those statutes and decided that the procedure by which the district was organized and the right of way condemned was in accordance with the requirements imposed by the state legislature and within the limitations of the Constitution of the State. The findings as to all controverted facts are in favor of the regularity and legality of the organization of the district and of the condemnation of the right of way. The State Court has declared the purpose and object a public one. This court has, in all cases where the question was presented, held that a purpose such as is sought by the district, a public one and one over which the state has absolute control both as to the object sought and the means or method by which the end is accomplished and that this court will only inquire to see that there was no violation of the guarantee as to "due process of law." The laws of Nebraska providing the method of procedure for the condemnation of right of way is clearly within the rules fixed by this court in all of the cases in which it has felt called upon to fix limitations.

*Questions Not Raised in State Court.*

The claims made by the plaintiffs in the trial court under the Federal Constitution were but two and both under the first section of the Fourteenth Amendment of the Federal Constitution.

The first is found in the fifteenth paragraph of the petition and so far as material to the controversy is as follows:

"The plaintiffs allege that said defendants are not the officers or agents of a corporation or body politic nor known as Drainage District Number Two (2) of Dakota County, Nebraska. and have no reasonable authority or right whatever under the constitution of the United States of America to invade the plaintiff's said land herein described and to construct or dig any ditch or canal thereon or to carry the water from said Elk Creek across the same or empty the same into said Jackson Lake and to do anything to the injury thereof, and that to permit them to do so would be in violation of Section 1, Article 14 of the United States of America which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the law." (See Pr. Tr. p. 6).

The second is found in the third paragraph of the reply in which it is alleged that sections 14, 15, 16 and 17 of the act of the legislature of the State of Nebraska for the year 1905 (being sections 6252, 6253, 6254 and 6255, Comp. Stat.), are in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, which provides: "That no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the law." (See Pr. Tr. pp. 15-16).

## ONLY QUESTION RAISED IN SUPREME COURT OF STATE WAS ORGANIZATION OF THE DISTRICT.

In the Supreme Court of the State the only appeal to the protection of the Federal Constitution is found in the third assignment of error and is as follows:

"The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment of the district court in holding Drainage District Number Two to be a corporation in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States." (See Pr. Tr. pp. 179, 180).

The sections of the Nebraska Code of Civil Procedure relating to appeals are quoted in the statement. (See statement, pp. 34-35.) It is certain that all questions to be decided by the State Supreme Court must be called to its attention by the assignments of errors so made and in this case there was but the one attempted to be based on a Federal right—that the district had not been organized—which, as we have shown, did not present a Federal question.

It follows that the alleged errors based on Section 4, Article IV of the Constitution and on Section 1 of the Fifteenth Amendment or any of the alleged errors based on Section 1 of the Fourteenth Amendment except those relating to the organization of the district have never been presented to or passed upon by the State Supreme Court. As the method of organization of a corporation is a state question and is not a Federal question, this court is without jurisdiction.

It will be noted that nowhere is there any question raised as to the procedure by which the right of way was condemned. There is an attack as to the validity of sections 14 to 17 inclusive of the Drainage Statute. We have shown that the statute under which the district was organized was constitutional; that the proceedings under that statute was in conformity with the provisions thereof and that under the rule adopted by this court in the construction of the Federal Constitution no Federal questions are presented by the attack on the organization of the district. The attack made in the plaintiff's reply filed in the trial court as to the sections 14,

15, 16 and 17 must fail as a reading of the sections demonstrates to a certainty that they refer not to the plaintiffs at all, but to the persons who are owners of propery within the district and necessary parties in the organization of the district. The most liberal construction applied to the assignment of error in the State Supreme Court is that it was attacking the legality of the organization of the corporation, and for the reasons given above it presents no Federal question. However, we have gone over the entire record in this case and compared it with the rules laid down by this court, and so measured, the law attacked by the plaintiffs comes clearly within the limitations prescribed by the Constitution of the United States, its Amendments and the interpretation thereof as placed upon both by this court. As to all questions raised by the plaintiffs in either court this court has decided against the plaintiffs frequently in cases where the same questions are involved and this brings us to the motion upon which this case is being submitted.

## VII.

## THE MOTION TO DISMISS AND AFFIRM SHOULD BE SUSTAINED.

The motion to dismiss this action and to affirm the judgment and decree of the State court should be sustained for the following reasons:

1. The only errors alleged in the State Court which attempt to present Federal questions are claimed under Section 1 of the Fourteenth Amendment to the Constitution of the United States and this court has frequently in cases presenting the same questions decided that Federal questions were not presented, that it was without jurisdiction and dismissed the cases.

2. The questions presented by the assignment of errors are frivolous and the writ of error is only for delay.

3. The court has no jurisdiction of anything presented by the record in this case.

The Supreme Court has no jurisdiction to re-examine the judgment of a State Court, unless the record shows, affirmatively or by fair implication, that a Federal question necessary for the determination of the cause is involved.

Williams vs. Norris, 25 U. S. (12 Wheat.), 117; 6 L. Ed., 571.

Willson vs. Blackbird Creek Marsh Co., 27 U. S. (2 Pet.), 245; 7 L. Ed., 412.

Satterlee vs. Matthewson, 27 U. S. (2 Pet.), 380; 7 L. Ed., 458.

Mills vs. Brown, 41 U. S. (16 Pet.), 525; 10 L. Ed., 1055.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169.

Furman vs. Nichol, 75 U. S. (8 Wall.), 44; 19 L. Ed., 370.

Brown vs. Atwell, 92 U. S., 327; 23 L. Ed., 511.

Citizens' Bank vs. Board of Liquidation, 98 U. S., 140; 25 L. Ed., 114.

Boughton vs. Exchange Bank, 104 U. S., 427; 26 L. Ed., 765.

This court has no jurisdiction to re-examine the judgment of a state court where a federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

Hurley vs. Street, 81 U. S. (14 Wall ), 85; 20 L. Ed., 786.

McManus vs. O'Sullivan, 91 U. S., 578; 23 L. Ed., 390.

Bolling vs. Lersher, 91 U. S., 594; 23 L. Ed., 366.

In order to bring a case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and decided in the court below.

Crowell vs. Randell, 35 U. S. (10 Pet.), 368; 9 L. Ed., 458.

Choteau vs. Marguerite, 37 U. S. (12 Pet.), 507; 9 L. Ed.,1174.

Coms vs. Gallagher, 40 U. S. (15 Pet.), 18; 10 L. Ed., 645.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

Maxwell vs. Newbold, 59 U. S. (18 How.), 511; 15 L. Ed., 506.

Hoyt vs. Shelden, 66 U. S. (1 Black), 518; 17 L. Ed., 65.

Taylor vs. Morton, 67 U. S. (2 Black), 481; 17 L. Ed., 277.

The Victory, 73 U. S. (6 Wall.), 382; 18 L. Ed., 848.

Gibson vs. Chouteau, 75 U. S. (8 Wall.), 314; 19 L. Ed., 317.

Cockroft vs. Vose, 81 U. S. (14 Wall.), 5; 20 L. Ed., 875.

Detroit City Ry. Co. vs. Guthard, 114 U. S., 433; 5 Sup. Ct., 811; 29 L. Ed., 118.

Kansas Endowment Ass'n vs. State of Kansas, 120 U. S., 103; 7 Sup. Ct., 499; 30 L. Ed., 593.

The facts giving the Supreme Court jurisdiction to review the decision of a state court must appear on the record, or be necessarily implied therefrom.

Miller vs. Nicholls, 17 U. S. (4 Wheat.), 311; 4 L. Ed., 578.

Satterlee vs. Matthewson, 27 U. S. (2 Pet.), 380; 7 L. Ed., 458.

Ocean Ins. Co. vs. Polleys, 38 U. S. (13 Pet.), 157; 10 L. Ed., 105.

The Victory, 73 U. S. (16 Wall.), 382; 18 L. Ed., 848.

Gibson vs. Chouteau, 75 U. S. (8 Wall.), 314; 19 L. Ed., 317.

Murray vs. Charleston, 96 U. S., 432; 24 L. Ed., 760.

The United States Supreme Court will not review the judgment of a state court on the ground of a denial by the latter court of a right under a statute of the United States, unless the record shows, either by words used or by clear and necessary intendment therefrom, that the right was specifically claimed, or a definite issue as to the possession of the right is distinctly deducible from the record, without any adverse decision of which the judgment could not have been rendered. (Judgment (1896) 69 N. W., 1151; 49 Neb., 795, affirmed).

Capital Nat. Bank vs. First Nat. Bank, 172 U. S., 425; 43 L. Ed., 502; 19 S. Ct., 202.

In determining whether the United States Supreme Court has jurisdiction, under Section 25 of the Judiciary Act, nothing outside the record certified to the court can be taken into consideration.

Armstrong vs. Athens County Treasurer, 41 U. S. (16 Pet.), 281; 10 L. Ed., 965.

Walker vs. Villvasco, 73 U. S. (6 Wall.), 124; 18 L. Ed., 853.

The petition for the allowance of a writ of error forms no part of the record of the court below; and this court has no jurisdiction to determine a Federal question presented in such petition, but not disclosed by the record sent here from the state court.

Warfield vs. Chaffe, 61 U. S., 690; 23 L. Ed., 383.

A general statement that the judgment violates the Federal Constitution, or the rights of the party thereunder, or that it is without due process of law, will not raise a Federal question, even though the judgment be a final one, reviewable by the Federal Supreme Court on writ of error, under Rev. Stat. U. S., Sec. 709, especially where such statement appears only in the specifications of error.

Clarke vs. McDade, 165 U. S., 168; 41 LL. Ed., 673; 17 S. Ct., 284.

A Federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state court.

Fay vs. Crozer, 217 U. S., 455.

Leonard vs. Vicksburg, S. & P. R. Co., 198 U. S., 416; 49 L. Ed., 1108; 25 S. Ct., 750.

A motion to affirm a judgment on a writ of error should be granted by the Supreme Court of the United States when the assignments of error are frivolous and the court is convinced that the writ was taken only for delay.

Blythe vs. Hinckley, 180 U. S., 333; 45 L. Ed., 557; 21 S. Ct., 390.

Chanute vs. Trader, 132 U. S., 210, 214; 33 L. Ed., 345, 346.

Richardson vs. L. & N. R. Co., 169 U. S., 128, 132; 42 L. Ed., 687, 688.

Crossley vs. City of New Orleans, 108 U. S., 105; 27 L. Ed., 667.

New York & N. E. R. Co. vs. Town of Bristol, 151 U. S., 556, 571; 38 L. Ed., 269, 274.

When the allegation that the suit arises under the Federal Constitution is palpably unfounded, it does not constitute even color for the jurisdiction for the United States Circuit Court.

McCain et al., vs. City of Des Moines, 174 U. S., 168, 181; 43 L. Ed., 936, 941.

Gring vs. Ives, 222 U. S., 365; 56 L. Ed., 235.

It is settled that the mere averment of a constituitonal question is not sufficient, when the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason.

Farrell vs. O'Brien, 199 U. S., 89, 100.

Fayerweather vs. Ritch, 195 U. S., 276, 299.

Goodrich vs. Ferris, 214 U. S., 71, 79.

Gring vs. Ives, 222 U. S., 365; 56 L. Ed., 235.

"Where there is sufficient color for motion to dismiss, we can entertain the motion to affirm and where the appeal is governed by former decisions of this court, we are justified in holding that the appeal was taken for delay and in dismissing the appeal or writ of error."

The Alaska, 130 U. S., 201.

No Federal question has been presented and the assignments of error are frivolous and evidently made for the purpose of delay.

The motion should be sustained, the writ dismissed and the judgment of the State Court affirmed.

Respectfully submitted,

A. L. Strang and

P. E. Evans

*Attorneys for Defendant in Error.*

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Number 804.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term 1913.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR,

V.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR, AND CHARLES H. MAXWELL, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

## SUPPLEMENTAL BRIEF AND ARGUMENT OF WILLIAM V. ALLEN, ATTORNEY FOR PLAINTIFFS IN ERROR.

Some months ago the defendants submitted a motion, accompanied by a brief, to dismiss the writ of error and to affirm the judgment of the Nebraska court, but it was denied and the case set down for hearing. In their brief the defendants made a partial statement of facts and discussed the jurisdiction of the court; and the plaintiffs filed a brief in opposition thereto to which I shall have occasion to refer as being, in a measure the basis of this brief and argument.

I desire to devote a moment to a further statement of some material facts, and in doing so an observance of proper

chronology demands a reference to the statute on the subject of the forcible creation of drainage corporation, the validity of which is here drawn in question.

The act of 1905 is chapter 161 of the laws of that year, and contains thirty-nine sections and is to be found on pages 610 to 635 of the session laws of that year. It will also be found in exhibit "A" of the plaintiffs' brief immediately following page 117. Chapter 147 of the laws of 1909, consists of fifteen sections and amends sections 1, 8, 9, 13, 14, 15, 17, 18, 19, 20, 24 and 31 of the act of 1905. Section 1 amends section 1 of the act of 1905, by omitting "resident" from the sentence "a majority in interest of the resident owners, etc." due, doubtless, to the holding of the state court in *Catron v. Dailey,* (May 21, 1909), 84 Neb. 487, 490. This change makes it possible for "a majority in interest," by which is meant the person or corporation having the greater number of acres (sec. 5), regardless of residence, to bring an action in the district court and secure an order or decree forming a drainage district contrary to the wishes and over the protest of the owners of other lands therein, and thus impose upon them practically unlimited assessments, taxes, etc., and authorize the creation of a bonded indebtedness.

Chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909, is article 4, chapter 19 of the Revised Statutes of 1913 (Revised Statutes 1913, pp. 504-526), and the only statute that attempts to delegate power to a court to create a drainage or other corporation by an order or decree; and, is in this respect, *sui generis,* as all other statutes respecting the formation of drainage corporations provide that they are to be created by the voluntary act of the incorporators, as pointed out in articles 1 and 2, chapter 19, pp. 486-499 of the Revised Statutes of 1913; or by the board of county commissioners, a political body and agency of the state, as pointed out in the Revised Statutes of 1913, article 2, chapter 19, pp. 495-496; or as pointed out in article 3, chapter 19 of the Revised Statutes of 1913, pp. 499-505; or by a vote of the land owners as pointed out in article 5,

chapter 19 of the Revised Statutes of 1913, pp. 526-537, or by a judicial order or decree as pointed out in article 4, chapter 19 of the Revised Statutes of 1913, pp. 505-526, which latter is the act in question.

The respective drainage acts are carried into what is known as Cobbey's Annotated Statutes, which accounts for the defendants' answer referring to certain sections of the Annotated Statutes; but they are the act in question.

September 4, 1909, (record p. 10, fol. 16) certain named persons (record pp. 25-26, fols. 41-43) signed and filed "articles of association" in the office of the clerk of the district court of Dakota county for a drainage district to be known as No. 2. Summonses were served on real estate owners who refused to join in the enterprise (record pp. 27-34, fols. 45-54; record pp. 38-42, fols. 60-66), and subsequently nondescript papers entitled "consent to formation of district" (record pp. 34-37, fols. 55-59) and "re-petition" (record pp. 47-49, fols. 75-78), were filed.

On the 23rd day of October, 1909, (record pp. 51-52, fols. 81-83), the district court entered an order overruling all objections and requests of land owners to have their property excluded, and entered an order or decree forming district No. 2. The "articles of association" contained forty-nine names (record p .45, fol. 72) when filed; but of this number, Jacob F. Leamer, I. W. Fisher, Adam O. Sides and Henry Ostmeyer withdrew, leaving forty-five. Sometime thereafter these persons filed papers entitled "consent to formation of district" and "re-petition." Fifty-one owners of real estate in the proposed district (record pp. 51, 52, fols. 81, 82) objected to the organization, and to their property being included therein, but their objections were overruled, the court holding (record p. 51, fol. 81), that the signers of the "articles of association" were "a majority in interest" of the acreage described in said "articles of association," notwithstanding one hundred and thirty persons at the time owned real estate in the proposed district (record pp. 38-39, fols. 60-62, exhibit "8"). Seventy-nine real estate owners refused to join in the

enterprise, of which number forty-nine filed objections (record p. 45, fols. 71-72, exhibit "10").

The defendants and others claiming to be officers and members of the organization (record p. 67, fol. 106) changed the boundaries of the proposed district.

By virtue of the provisions of the act, the defendants made an application to the county judge (record pp. 71-72, fols. 113-115) in which they represented that Henry W. O'Neill, Cornelius K. Heffernan and Elizabeth Leahy owned certain lands lying beyond the boundaries of the proposed district over which they refused to permit the location of a drainage ditch, and praying that "appraisers * * * be appointed for the purpose of appraising a right of way as by statute in such cases made and provided" (record p. 73, fol. 115); and the county judge appointed three persons as appraisers (record p. 74, fol. 117-118) who, pursuant to his order (record p. 75, fol. 118-119), appointed a time for a hearing and notified Messrs. O'Neill and Heffernan and Mrs. Leahy (record p. 80-81, fol. 127) of their appointment and the time and place they would meet and "inspect and view the said real estate, and hear all parties in interest in the same," (record p. 81, fol. 127); and they filed a report by which they pretended to make an appraisement of a right of way over the lands of Messrs. O'Neill and Heffernan and Mrs. Leahy.

At the commencement of this suit, which, according to the Code of Civil Procedure of Nebraska is denominated a civil action, Henry W. O'Neill was, and for more than a quarter of a century prior thereto had been, the owner and occupant of the southeast quarter of the southeast quarter of section 29, township 29, range 8, known as lot four (4), the southwest quarter of the southwest quarter of section 28, township 29, range 8, and the northwest quarter of the southwest quarter of section 28, township 29, range 8, known as lot five (5) in Dakota county. It is important to remember lot *five* (5) as it lies east of Jackson lake and is to be hereafter spoken of. Cornelius K. Heffernan owned and occupied the northeast quarter of the northwest quarter of section 36,

township 29, range 7, and the northwest quarter of the northeast quarter of section 36, township 29, range 7, and Mrs. Leahy owned the southeast quarter of the southeast quarter of section 25, township 29, range 7 (record pp. 84, 85, fols. 132, 133).

That the lands of the plaintiffs are highly valuable for agricultural purposes is conclusively shown by the fact that the appraisers awarded Henry W. O'Neill $3,260 for a right of way of 5.8 acres across the southeast quarter of the southeast quarter of section 29, township 29, range 8, or $562.08 per acre; $619 for a right of way of 3.63 acres across the southwest quarter of the southeast quarter of section 28, township 29, range 8, or $170.52 per acre, and $100 for a right of way of .67 acres across the northwest quarter of the southwest quarter of section 28, township 29, range 8, or *lot five* (5), or $149.25 per acre; to Cornelius K. Heffernan $560 for a right of way of 2.3 acres across the northeast quarter of the northwest quarter of section 36, township 29, range 7, or $243.48 per acre, and $3,288 for a right of way of 6.94 acres across the northwest quarter of the northeast quarter of section 36, township 29, range 7, or $473.77 per acre; and to Elizabeth Leahy $900 for a right of way of 3.5 acres across the southeast quarter of the southeast quarter of section 25, township 29, range 7, or $257.14 per acre, (record pp. 84, 85, fols. 132-133).

This action was commenced in the district court of Dakota county, July 5, 1912 (record p. 1, fol. 1), and was tried before the same judge that entered the order or decree establishing the district. The petition states the facts more fully than necessary and is by no means artistically drawn. It avers, *inter alia* (record pp. 1-7, fols. 2-11), that the plaintiffs and Mrs. Leahy owned, respectively, the above described lands over which a right of way for a drainage ditch was sought to be taken by the defendants, who claim to be officers of a drainage district, one hundred (100) feet wide either way from a center line, or two hundred (200) feet wide in all (record p. 84, fol. 185), fifty (50) feet wide at the top, thirty (30) feet wide at

the bottom, and fifteen (15) feet deep, leaving seventy-five (75) feet on either side for bermes and a dump; and praying for an injunction to prohibit the same, which they asked to be made perpetual on the final hearing. The petition specifically avers that the act of 1905, as amended by the act of 1909, is in violation of the 14th amendment to the Constitution of the United States (record pp. 6, 7, fols. 10, 11, pars. 15, 16).

The answer of the defendants (record pp. 8-14, fols. 14-22) admits that Mr. O'Neill owns and occupies the land claimed by him and described in the petition, except the southwest quarter of the southeast quarter of section 29, township 29, range 8, *or lot five (5).* But as the defendants attempted to condemn and appropriate a right of way over *lot five (5),* and as the uncontradicted testimony of Mr. O'Neill, corroborated by that of others, is that he has owned and occupied it for twenty-seven years (record pp. 105, 106, fols. 170, 171), and as it was appraised as his property, *or* the property of Mary Agnes Swift (record p. 84, fol. 133), and as Mary Agnes Swift has never made any claim to it and was not a party to the proceeding, the defendants are estopped to deny Mr. O'Neill's ownership, which becomes an established fact. The answer also admits the ownership of Cornelius K. Heffernan and of Mrs. Leahy, and that the plaintiffs' lands lie between the village of Jackson and Jackson lake, and at a distance of from one (1) to two (2) miles to the east and north of Jackson (record p. 9, fol. 15), and that no part of the water of Elk creek runs upon the plaintiffs' lands (record p. 10, fol. 15). The answer further avers that the defendants claim that the so-called drainage district was organized under certain sections of Cobbey's Annotated Statutes, which is the act of 1905, as amended by the act of 1909 (see Cobbey's Annotated Statutes, 1907, secs. 5561 to 5597), the constitutionality of which is here drawn in question; and that after notice and a hearing the court entered an order incorporating district No. 2, and that a certified copy thereof was filed and recorded in the office of the secretary of state (record p. 10, fol. 16). It avers that the defendants claim to be supervisors of the district (record

p. 10, fol. 17), and that said alleged district was regularly created and made a public corporation and body politic of Nebraska (record pp. 10, 11, fol. 17) by the order of the district court; and the defendants claim that after they shall have paid the county judge, for the benefit of the plaintiffs, the sums fixed by the appraisers for the right of way, they will have the right to and will in fact enter upon the plaintiffs' lands and "construct and make upon said lands a large ditch, or canal (record p. 11, fol. 18) to perpetually carry the water across the plaintiffs' lands for a distance of about two miles and empty the same into what is known as Jackson lake" (record p. 11, fol. 18); and that on the filing of the articles of association in the district court for the creation of a district, the court "duly declared" said district "a public corporation of said state of Nebraska under said law" (record p. 11, fol. 19).

The answer states in detail what it is claimed the defendants and their associates did after the organization, and avers an appraisement of a right of way on the plaintiffs' land (record p. 13, fol. 21), and that neither of the plaintiffs appealed from the appraisement and that when the amounts allowed by the appraisers shall have been deposited with the county judge, the plaintiffs will not "own said rights of way over and across said real estate and will have no interest therein, except to ask and receive the payment of said awards" (record p. 13, fol. 21). The answer contains a prayer (record p. 14, fol. 21) that the temporary injunction be dissolved and the case dismissed.

The plaintiffs in their reply (record pp. 14-16, fols. 23-27) deny the respective allegations of the defendants' answer and aver that the act of 1905 is in violation of the Constitution of the United States, and, after stating other matters not important to notice, specifically aver that the act of 1905 is in violation of the 14th amendment to the Constitution of the United States, and is, therefore, void. The averments of the reply are full and formal (record pp. 14-16, fols. 23-27), and are in sub-

stance the same as those made in the petition. The issue arises between the answer and the reply.

It is proper, in this connection, to state that, owing to clerical errors, both the petition and the reply challenge the constitutionality of the act of March 27, 1907, entitled "An act to provide for drainage districts to drain wet lands, etc"; but that question is not in the case.

Jackson, or Cutoff lake, as it is sometimes called, is a crescent-shaped body of water lying from the northwest to the southeast, the outer segment of which is to the west, or southwest. It is approximately seven miles long with an average width of from four to five hundred feet, and a depth of from nothing to four or five feet, and covers about eight hundred acres (record p. 92, fol. 147). The larger portion of *lot five (5)*, a part of Mr. O'Neill's land (record p. 153, fol. 249), lies north (east) of the lake (record p. 93, fol. 148), but a small fraction is south (west) (record p. 93, fol. 148). The condemnation and appraisement of the .63 acres of *lot five (5)* was about * * * where the north line intersects the south bank of what is known as Jackson lake" (record p. 19, fol. 22), which shows that but a small part of *lot five (5)* was condemned. The main body is east (north) of the lake. It is a forty (40) acre tract (record p. 93, fol. 148) and there was no condemnation of any part lying to the north or east. A four-foot rise of water would cover all of *lot five (5)* (record p. 96, fol. 154).

A blue print of the *locus rei sitae* made from contour maps issued by the government will be found between pages 24 and 25 of the plaintiffs' brief.

Such proceedings were had in the district court in this case by which the alleged drainage organization is claimed to exist, that on the 12th day of February, 1912, after the case had been under advisement for many months, a finding was made and a decree passed against the plaintiffs, dismissing the case at their cost; and February 27, 1912 (record pp. 22-23, fols. 37-38), an appeal was perfected to the supreme court of Nebraska; where, May 17, 1912, the judgment of the subordi-

nate court was affirmed (record p. 155, fol. 253). And on the 23rd day of June, 1913 (record pp. 159-161, fols. 263-265), the plaintiffs filed a motion for a rehearing which was overruled September 13, 1913, and the case is in this court on writ of error to the supreme court of Nebraska.

A word of explanation. The record is in some confusion, due, in a measure, to the belief of the defendants that it was necessary for them to introduce the files in the proceeding to establish the district to show that the district court had jurisdiction to enter the order, or decree therein. But sufficient is shown to establish the fact that the major proposition presented for the consideration of this honorable tribunal is the constitutionality of the act of 1905, as amended by the act of 1909.

## I.

## THE JURISDICTION OF THIS COURT IS UNDOUBTED.

The specifications of error will be found on pages 26 to 29 of the plaintiffs' brief. The defendants in their brief challenge the jurisdiction of the court to hear the case, claiming that this tribunal is bound by the state decisions. In addition to what is said on this subject in the plaintiffs' brief, I take the liberty of making the following citations:

In Bunn's United States Courts (1914), pp. 99-100, it is said:

> It seems obvious that in its exercise of revisory power over the judgments of state courts the supreme court of the United States can not hold itself bound to follow the state court on questions of law, or bound by the state court's finding of fact. In a case, for example, where the question is whether a state law violates the obligation of a contract, or in a case where a state law is alleged to take property without due process, the supreme court of the United States, in order to make its revisory power effectual, must of necessity decide for itself both the facts and the law. *Mobile & O. R. R. Co. v. Tennessee,* 153 U. S. 486, 492, 14 Sup. Ct. 968, 38 L. ed. 793; *Stearns v. Minnesota,* 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162; *Huntington v. Atrill,* 146

U. S. 657, 13 Sup Ct. 224, 36 L. ed. 1123; *State of Washington v. Fairchild*, 224 U. S. 510, 528, 32 Sup. Ct. 535, 56 L. ed. 863; *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. ed. 1074.

In *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 159, 41 L. ed. 369, 389, it is said:

> We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. *As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law.*

In *Chicago, Burlington & Quincy Railroad Company v. Illinois ex rel Grimwood*, 200 U. S. 561-601, 50 L. ed. 596, it is said in the syllabus:

> A state court can not, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the supreme court of the United States, if a federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.

In Hughes' Federal Procedure (1913), p. 535, it is said:

> Another instance (of the jurisdiction of the court) is the question whether the taking of property under a state statute constitutes a taking for public use, or deprives the party of his property without due process of law.

In speaking of this subject, it is said in Loveland's Appellate Jurisdiction (1911), sec. 333, p. 714, it is said:

> If the plaintiff in error had invoked the protection guaranteed by these amendments and the claim was plausible on its face, the denial of that claim clearly gives to the supreme court jurisdiction. The power of that court to revise the final judgment or decree of a state court in that respect does not depend upon whether the decision of that question was erroneous. It is only necessary that the state court deny the claim.

In Taylor's Jurisdiction and Procedure of the United States Supreme Court (1905), pp. 362, 363, it is said:

> A refusal to consider a federal question which is controlling in a case is equivalent to a decision against the federal right involved therein, and gives the supreme court jurisdiction to review. *Des Moines Nav. & R. Co. v Iowa Homestead Co*, 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

In view of the fact, therefore, that it is averred in the petition that the act of 1905 as amended by the act of 1909, is "in violation of the Constitution of the state of Nebraska, and of the United States of America" (record pp. 6, 7, fol. 10), specific reference being made to section 1 of the 14th amendment (record p. 6, fol. 10); and in paragraph 3 of the reply (record pp. 15, 16, fols. 25, 26), and was assigned as error and discussed in the supreme court of the state (record p. 1-7, fol. 10), it would be difficult to present the question more squarely.

## II.

## A BRIEF REFERENCE TO NEBRASKA DRAINAGE STATUTES AND DECISIONS.

Notwithstanding that the distinction between a municipal and a private corporation is marked in the Constitution of Nebraska, and in the common law, and that it is elementary that this tribunal is the exclusive judge of whether or not an act is in violation of the 14th amendment to the Constitution, it may be proper to observe that the defendants and their associates had full authority to create a drainage corporation in any of the ways pointed out in the statutes compiled in subdivisions one, two, three, and five of chapter 19 of the Revised Statutes of 1913, to which reference has been made. (Revised Statutes 1913, p. 489, sec. 1729; p. 503, sec. 1790; p. 531, sec. 1880). But the difficulty with those statutes is that none of them authorize the coercion of reluctant land owners into corporate relations with others who desire to be benefited thereby, or enable them to enhance the value of their property at the expense of their neighbors.

Chapter 116 of the laws of 1903, the forerunner of the act of 1905 (but repealed by section 38 of the latter), was the first attempt to authorize the creation of a drainage corporation by judicial decree.

In *Neal v. Vansickle*, 72 Neb. 105, a part of the act of 1903 was held void and a part valid by a court commissioner whose decision (*Flint v. Chaloupka*, 72 Neb. 34; *Modern Woodmen of America v. Colman*, 68 Neb. 660, 665; *Hoagland v. Stewart*, 71 Neb. 102, 106) is "of no value as authority or precedent" and is not even *stare decisis*. But whether that act was in conflict with the 14th amendment was not set up, considered, decided, or even mooted.

Now every decision of the Nebraska court following *Neal v. Vansickle* is based on that case (*Barnes v. Minor*, 89 Neb. 189, 194; *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, 366; *Drainage District No. 1 of Pawnee County v. Chicago, Burlington & Quincy R. Company*, 96 Neb. 1; *White v. Papillion Drainage District*, 96 Neb. 241; *Whedon v. Wells*, 95 Neb. 517), and it is based on a Missouri case, and the Missouri constitution provides for the condemnation of property for *private* drainage (Missouri Constitution, sec. 20, art. 2). So that if *Neal v. Vansickle* is without force, all decisions based on it are inherently weak and inconclusive. But *Neal v. Vansickle* and the decisions based on it are in hopeless conflict with *Dodge County v. Acom*, 61 Neb. 376, 389, 390; *Tyson v. Washington County*, 78 Neb. 211, 213; *State v. Ross*, 82 Neb. 414, 421; *Roberts v. Thompson*, 82 Neb. 458, 461; *Johannes v. Thayer County* 83 Neb. 689, 698, and *Wilber v. Reed*, 84 Neb. 767, 770, 771, *et seq.*, in which it is held that an attempt to delegate political or administrative power to the courts is in violation of the Constitution and void.

After the case was brought here the Nebraska court decided *Cuming County v. Bancroft Drainage District*, 90 Neb. 81; *Morehouse v. Elkhorn River Drainage District*, 90 Neb. 406; *Nemaha Valley Drainage District v. Stocker*, 90 Neb. 507; *Nemaha Valley Drainage District v Skeen*, 90 Neb. 510;

*Nemaha Valley Drainage District v. Higgins*, 90 Neb. 513; *Nemaha Valley Drainage District v. Marconnit*, 90 Neb. 504; *Holmvig v. Dakota County*, 90 Neb. 576; *Gray v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 90 Neb. 795; and *Richardson County ex rel. Sheehan v. Drainage District*, 96 Neb. 169, in some of which it is re-asserted that the organization is a public corporation; but in none of them is it held that it can exercise the right of eminent domain.

*Drainage District v. Chicago, Burlington & Quincy Ry. Co., supra*, is based on the act in question and *Cuming County v. Bancroft Drainage District, supra*, is based on the act of 1907 (which is article 5, chapter 19 of the Revised Statutes of 1913), while *Whedon v. Wells supra* is in respect of a drainage district formed in a municipal corporation for sewer and other purposes.

It is significant that in *White v. Papillion Drainage District*, 96 Neb. 241, it is said:

> 2. *The right of eminent domain is not involved in this case. That provision of the act is severable, and it is not necessary in this case to consider whether section 14 of the act is valid.*

The section 14 referred to is section 1880, chapter 19, Revised Statutes of 1913, p. 531. Aside from the holding in this case *sub silentio* the question of the right of such an organization to exercise the power of eminent domain has not been determined by the Nebraska court and is *res nova*. But whether it is to be regarded as a public or a private corporation is a matter of no consequence as stated *Bailey v. Mayor, etc. of the City of New York*, 3 Hill (N. Y.) 531, 539, *et seq.*, in which it is held that where a municipal corporation attempts the exercise of the right of eminent domain for a purpose essentially private the act is unconstitutional and void.

Chief Justice Nelson, subsequently a member of this court, said:

> But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same

footing as would any individual or body of persons upon whom the like special franchises had been conferred. *Dartmouth Coll. v. Woodward,* 4 Wheat. 668, 672; *Philips v. Bury,* 1 Ld. Raym. 8, S. C. 2 T. R. 352; *Allen v. McKeen,* 1 Sumner 297; *People v. Morris,* 13 Wend. 331, 338; 2 Kent. Com. 275, 4th ed.; *U. S. Bk. v. Planters' Bk.,* 9 Wh. 907; *Clark v. Washington,* 12 Id. 40; *Moodalay v. E. I. Co.,* 1 Bro. Ch. 469.

And there can be no doubt that where power is conferred upon courts to grant charters to corporations, the act of the court is legislative and not judicial in its nature. *In re Union Club,* 82 S. E. Rep. (Geo.) 643. It would seem to be elementary that it is the nature of the power rather than the instrumentality through which it is exercised, that classifies it. So that if the power to create a corporation is legislative, though exercised by the decree or order of a court, it remains legislative, and the decree or order is not *res adjudicata* and can not be pleaded as an estoppel.

III.

## CHAPTER 161 OF THE LAWS OF 1905, AS AMENDED BY CHAPTER 147 OF THE LAWS OF 1909, IS IN VIOLATION OF SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION.

For convenience, I subjoin a skeleton of chapter 161 of the laws of 1905, as amended by chapter 147 of the laws of 1909:

> Section 1. (As amended.) A majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, * * * may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise, and * * * may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than one hundred and sixty acres, the names and place of residence of the owners of the land * * * and the description of the several tracts or parcels of land, * * * and * * * the

name or names and the description of the real estate owned by such as do not join in the organization * * * *. but who will be benefited thereby, * * * and said articles shall * * * state that the owners of real estate * * * are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drainage of the said lands * * * * as provided by law, and after said articles of association shall be signed, the same, shall be filed in the office of the clerk of the district court of the county in which such drainage district is located, * * * praying that they may be declared a drainage district under this article.

Sec. 2. Immediately after such articles of association shall have been filed, * * * the clerk of the district court * * * shall issue a summons * * * returnable at the next term of the district court directed to the several owners of real estate * * * who may be averred to be benefited thereby, but have not signed, said articles of association, which shall be served as summons in civil cases, * * * setting forth * * * that the articles of association, * * * have been filed, and the purpose thereof, and that the real estate of such owner or owners situated in said district, * * * will be affected thereby, and rendered liable to taxation or assessment, for the purpose of draining said district, and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same.

Sec. 3. All owners of real estate * * * who have not signed said articles of association and who may object to the organization of said drainage district, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection, or objections in writing * * * why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and * * * be embraced in said drainage district, and liable to taxation for draining the same, and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case such objections are overruled, the district court shall, by its

order duly entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and * * * be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included * * * and will not be benefited thereby, * * * the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for.

Sec. 4. Within twenty days after the said district has been declared a corporation by the court, the clerk thereof shall transmit to the secretary of state a certified copy of the record relating thereto, and the same shall be filed in his office in the same manner as articles of incorporation are now required to be filed under the general law concerning corporations. A copy of said record, together with a plat of the district shall * * * also be filed in the office of the county clerk of the county, or counties, in which said district, or any part thereof, is situated.

Sec. 5. * * * The clerk of said court shall * * * * call a meeting of the owners of said real estate situate in said district * * * for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district and resident of the county * * *; the land owners, when assembled, shall organize by the election of a chairman and secretary * * * *, who shall conduct the election; and * * * each and every acre of land shall represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in such district, and the five persons receiving the highest number of votes shall be declared elected * * *; and * * * shall immediately * * * * determine their terms of office, * * *.

Sec. 6. Every year after the election of the first board of supervisors, * * * such owners shall meet and elect one supervisor * * * in like manner as in the preceding section, who shall hold his office for five years and until his successor is elected and qualified; * * *.

Sec. 7. Omitted as having no bearing on the case.

Sec. 8. (As amended.) The board of supervisors, shall, * * * after their election, choose one of their number chairman, and another secretary. * * * At each annual meeting the board shall make a report of what work has been done, and * * * annually publish a statement of its receipts and expenditures, in a legal newspaper, * * * of general circulation in the county in which said district was organized. Such board of supervisors shall receive $2.00 per day * * * for time actually employed in the business of said district, not exceeding eighty ($80.00) dollars each per year, but reasonable allowance shall be made for necessary clerical work, and assistance, and the secretary shall receive * * * * such compensation as the board of supervisors may agree upon, payable out of the district drainage fund. The board of supervisors may employ an attorney to act for the district and to advise said board.

Sec. 9. (As amended.) The board of supervisors of any drainage district * * * shall cause a topographical survey to be made of the district by some competent engineer. The said engineer shall make a * * * topographical survey of the * * * district and submit the same to the board * * * with maps and profiles * * * and a * * * plan for draining, reclaiming, and protecting the lands * * * from the overflow of or drainage by water, or floods; * * *. The said engineer shall also make an estimate of the cost of the entire drainage works and improvements required * * * to protect and reclaim said lands and property, showing the several items of the same. The said engineer shall go over and inspect and examine the lands * * * he shall assess the amount of benefits which will accrue to each tract or parcel of land and corporate property above named, by virtute of the works and improvements of said drainage district. Each tract or parcel of land, * * * within the district shall bear its share of the entire cost and expenses incurred * * * in making said works and improvements in proportion to the benefits assessed whether such improvements be made on the tract or parcel of land, * * * or not. The engineer in estimating the benefits to lands, * * * * shall not consider what benefits will be derived by said lands, after other ditches, improvements, or drainage plans shall be constructed, but only the bene-

fits which will be derived by the construction of the aforesaid works and improvements as they afford drainage or an outlet for drainage, or protection from overflow or damange by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water. * * * Said engineer shall also classify said lots, tracts, lands, and other property according to the benefit that each may receive from said drainage improvement. The lots, tracts and lands receiving the greatest percentage of benefits shall be classified at 100, those receiving a less percentage * * * at such less number as its benefit may determine. * * * The maps * * * shall be drawn upon a scale sufficiently large to represent all of the meanderings of the proposed improvements, and shall show the boundary lines of each lot, or tract of land, * * * the name of the owner of each lot or tract of land, as it then appeared on the deed records, * * * the distance in feet through each tract or parcel of land, the acreage thereof and such other matters as the surveyor or engineer deems material * * *.

Sec. 10. The board of supervisors * * * shall appoint some competent person to award all contracts contemplated in this article to the lowest bidder, subject to the approval of the board of supervisors, * * * to be known as the drain commissioner. * * * He shall have a general superintendence of all works put under contract * * * subject to the supervision and control of said board of supervisors, and * * * report the same when completed according to the terms and stipulations of the contract, and certify the same to the board of supervisors who shall review and accept or reject the work so completed. * * *

Sec. 11. If, upon the filing of the report of said engineer, * * * it shall appear that lands, other than those incorporated by the court in said district will be benefited by the drainage improvements of said district, it shall be the duty of the chairman of said board of supervisors to file a petition in the district court of the

county where said district was originally organized containing a description of said lands, * * * and alleging that said land will be benefited by the improvements and ought in justice bear its proportion of the expense and cost of such improvement, and that said land was not incorporated within the limits of the said drainage district as originally established by said court, * * * and praying that said tract or tracts * * * may be incorporated and made a part of said district. Upon the filing of said petition * * * the clerk of the district court of said county shall issue summons or notice to the parties interested as provided by section 2 of this act with reference to the original petition for the establishment of said district, and the same proceedings shall be had upon said petition and in said court as upon the original petition for the establishment of said district and the same provisions of law shall apply thereto insofar as the same are applicable; provided, however, that upon the return day of said notice or summons or at any other time to which said court shall adjourn said cause the court shall have jurisdiction to try and determine said matter at chambers and to make all necessary orders, judgments and decrees; * * *. Upon filing said petition * * * it shall be the duty of the clerk to docket said cause, as a proceeding in and part of the original cause for the establishment of said district. After the entering of the decree * * * the land and all of the parties so brought into said district shall be subject to the same provisions of law as would have applied to them had they been incorporated in the original petition and decree entered thereon; * * *.

Sc. 12. When said board of supervisors * * * have agreed upon a location or route for said ditch * * * * and formulated a plan for the other improvements * * * they, * * * shall have the right to acquire and if need be condemn any real estate, easement or franchise, whether the same be within the limits of such district or outside its boundaries, that may be necessary for a right-of-way over or upon which to construct and maintain the ditches, * * * drains, and other works * * *, and when the board of supervisors are unable to agree with the owners of any such property as to the acquisition of such right of way, * * * the board of supervisors * * * may present to the judge of the county court of the county * * * a petition setting

forth the location and character of the right-of-way needed and describing the lands to be crossed, * * * the quantity of land which is required to be taken, and * * * * the names of the parties interested in the lands to be crossed, and praying for the appointment of three appraisers, * * * to ascertain the compensation to be made, to such owners or parties interested. Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and the right of appeal shall be applicable to the drainage ditches and other improvements provided for in this act. Provided, the district shall not be authorized to enter upon and appropriate any right of way until the damages awarded are paid to the judge of said county court for the use of the parties interested * * *. Said board of supervisors, * * * shall have the right to acquire and if need be, condemn, in the same manner as is hereinbefore provided for the acquirement and condemnation of rights of way, * * *.

Sec. 13. (As amended.) Within ten days after the filing of the report of the engineer as provided by section 9 of this act with the chairman of the board of supervisors of the drainage district, the chairman of said board shall call a meeting * * * at which * * * said board shall fix the time and place * * * for the hearing of all objections to the report of said engineer, and to the classification of the lands and other property therein, and all objections made by the owner or owners, of any land, property, easement or franchise upon which the said engineer proposes an assessment for benefits, as to whether the said classification is fair and just and as to whether the said proposed assessment of benefits exceeds the benefits derived to their respective lands, and property from the said drainage improvements * * *. The said board of supervisors shall give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, * * *. A copy of the * * * notice * * * together with a resolution adopting the same shall be spread * * * on the minutes of the proceedings of the board * *.

Sec. 14. (As amended.) The drainage district by its attorney or any owner of land or other property * * *

whose land or property may be affected thereby may file objections to said report or to any item of the classification or the assessment of benefits therein set out, * * *. All objections shall be heard by the board of supervisors fully and fairly and as speedily as may be to carry out liberally the purpose and needs of such drainage district. It shall not be necessary for said drainage district to file any answer or other pleadings * * * but said matters shall be deemed denied and said * * * district shall have the right to interpose any matters in defense thereto which it may have * * *.

Sec. 15. (As amended.) * * * the board of supervisors shall meet for the hearing of the objections, * * * they shall proceed to hear any objection or objections * * * upon which an issue has been made, and * * * shall have the power to subpoena, swear and examine witnesses and to do all things necessary and incidental to a proper hearing and adjudication of said issues and * * * examine the maps, profiles, plans and report of said engineer and the items of the estimated cost of the drainage improvements recommended, and the classification of the lands and property * * * and the assessments of the benefits to the same as proposed by said engineer.

After due consideration * * * the said board of supervisors shall have power to adopt, amend, modify or reject the plan for the reclamation anl protection of the lands and property * * * recommended by the * * * engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken * * * and to estimate the cost thereof. From the decision of the said board on these matters no appeal will lie, but upon a proper showing * * * the said board may modify their order should such modification be necessary to promote the welfare of the drainage district. Said drainage board shall also have the power to establish the classification of the lands and property, and to determine and adjudicate the total amount of benefit that will accrue to each lot, tract or parcel of land or other property * * * from the drainage improvements. If an objection is overruled, the board may approve and confirm or modify the report as to the property affected, but if the objections are sustained, * * * may amend, or modify the report in any particular, and if they find the said classification or assessment of benefits to the lands

and other property to be in any respect inequitable, either less than, or in excess of the benefits accruing to said lands and property * * * they shall so order, and * * * shall thereupon so amend, adjust and equalize the said classification and benefits as may appear fair, just and equitable to them. And when said board has * * * adjusted, equalized and determined the classification of and assessment of total benefits to the lands and other property * * * as above required they shall enter an order confirming the same * * *.

Sec. 16. The costs of said hearing * * * shall be taxed and assessed as follows: First, if the said matter shall be determined by said board against the parties' contention objecting to said assessment, all costs upon the hearing of * * * said objections shall be adjusted against said objector. And said board of supervisors shall have the right to recover the same from said objector or objectors for the benefit of said drainage corporation in a civil action for that purpose * * * in the name of said drainage corporation. Second, in case said matter is finally determined * * * partly in favor of, and partly against, the contention of any objector, or objectors, the costs shall be apportioned between the drainage district and said objectors as said board shall deem just and equitable. Third, in case the contention of said objectors is wholly sustained and the matter is fully determined in their favor by said board, the costs shall be paid by said drainage district. * * *

Sec. 17. (As amended.) Any person * * * who has filed objections and had a hearing * * * or feeling aggrieved by the decision and judgment of the * * * said board of supervisors, may appeal to the district court * * * upon giving a bond conditioned the same as in appeals to the district courts as from civil actions in justices' court in this state, and payable to said drainage corporation, and in addition thereto conditioned that they will pay all damages which may accrue to said drainage district by reason of said appeal, * * *. Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, * * * and * * * shall hear and determine all such objections in a summary manner as a case in equity, and * * * increase or reduce the benefit on any tract where the same may be required in order to make the apportionment equitable.

* * * The clerk of the district court shall forthwith certify the decision of the court to the board of supervisors who shall take such action as may be rendered necessary by such decisions.

Sec. 18. (As amended.) As soon as the said board of supervisors have adjudicated, fixed and established the classification and benefits as provided by section 15 of this act, they may at once levy a tax on the lands and other property * * * to which benefits have been assessed, equal in amount to the cost of such drainage works and improvements as estimated by the said engineer and as modified and confirmed by said board plus the actual expenses of organizing said district the probable working and administrative expenses and damages (as estimated by the said board of supervisors) in the completion of said work and improvements and the carrying out of the objects of the said district, and in case bonds are issued, * * * then the amount of the interest (as estimated by the board of supervisors) which will accrue * * * shall be included and added to the said tax. The said tax shall be apportioned to and levied on each tract of land or property in said district in proportion to the benefits assessed and not in excess thereof. * * * The said levy of the tax, when so fixed and determined, shall be evidenced and certified by the board of supervisors, to the county clerk of each county in which lands of said district are situated, * * *. The * * * county clerk shall file said certificate * * * and record the same; provided * * * that if * * * the cost of the drainage works and improvements exceeds the amount of the tax levied against the lands and property in said district, * * * the board of supervisors may levy such other and further installments as may be necessary to complete the said works and improvements, but the total amount of all such levies and installments shall in no event exceed the total amount of benefits assessed to the lands and property in said district, such additional cost shall be apportioned to the lots, tracts, lands and property in the same proportion as in the first apportionment, * * * provided * * * that the board of supervisors may correct erroneous assessments and grant relief therefrom, and may correct clerical or other manifest errors in the schedules of the apportionment of the cost, discovered after being certified to the county clerk. The said board of supervis-

ors shall annually thereafter, determine, order and levy the amount of the installment of the tax * * * which shall become due and be collected, during said year at the same time that state and county taxes are due and collected, and in case bonds are issued as provided by section 20 * * * the amount of the interest which will accrue on such bonds shall be included and added to said tax, which said annual installment and levy shall be evidenced and certified by the said board * * * to the county clerk * * * in which lands of said district are situated * * *.

Which said certificate shall be filed in the office of said clerk and the said annual installment of said total tax * * * shall be extended * * * on the tax books of the county against the real estate, right of way, road or property to be benefited, * * * in the same manner that other taxes are * * * extended on the tax books of the county in a column under the head of "drainage tax" and shall be collected by the treasurer of the county * * * on which the tax is levied at the same time, and in the same manner, that the state and county taxes on said property are collected. Said county clerk shall be allowed the same fees as he received for like services in other cases.

Sec. 20. (As amended.) The board of supervisors may, if in their judgment it seems best, issue negotiable bonds not to exceed * * * the total tax levy certified to the county clerk * * * as provided by section 18 of this act, * * * bearing interest * * * at a rate not to exceed six per cent payable semi-annually, to mature at annual intervals commencing after a period of five years, * * * which said bond and interest coupons shall be executed in the name of the district and * * * signed by the chairman of the board of supervisors, attested with the seal of said drainage district and by the signature of the secretary of said board. * * * shall contain a recital that the same were issued in accordance with the provisions of this act and * * * are to be paid out of a sinking fund to be created as in this act provided. Before issuing any bonds under the provisions of this act, the board of supervisors * * * order and direct the issue thereof, * * *. Said bonds shall not be sold for less than par with accrued interest, shall show on their face the purpose for which they are issued, and shall be payable out of moneys

derived from the aforesaid drainage assessments or taxes. It shall be the duty of the board of supervisors in making the annual tax levy as heretofore provided, to take into account the maturing bonds and interest on all bonds, and make ample provisions in advance for the payment thereof. All bonds hereafter issued by any drainage district organized under the provisions of this act shall, before such bonds are sold or negotiated be presented to the auditor of public accounts and he shall examine such bonds and all the proceedings relative to their issue, and if he be satisfied that such bonds have been legally issued * * *, register the same in his office in a book kept by him for such purpose, * * *. It shall be the duty of the secretary of the board of supervisors * * *, provided further, that before funds can be secured by the levy of a tax or the sale of bonds, the board of supervisors * * * shall have power to borrow money and pledge the credit of the district for the payment * * * with interest in any sum not to exceed $5,000.00 to pay the necessary cost and expenses of the organization and incorporation of said district and all other legitimate charges and expenses incurred by the board and its officers and employees in performing the services and duties required of them by this act.

Sec. 21. All assessments on real property * * * shall be a lien against the said property assessed * * * shall draw interest at the rate of ten per cent per annum * * *. And such lien is not removed until the assessments are paid or the property sold for the payment thereof, * * * and the revenue laws of the state for the collection and sale of land for such taxes are hereby made applicable to the collection of assessments under this act. * * *.

Sec. 22. The board may sell said bonds from time to time * * *. Before making any sale, the board shall, by resolution declare its intention to sell a specified amount of the bonds * * * and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper, at their discretion * * *. The money derived from the sale of any bonds shall be deposited by the said board of supervisors with some bank or trust company * * * under such conditions as the said board may prescribe and may be withdrawn from

said depository when ordered by the said board on check or warrant signed by the chairman and countersigned by the secretary thereof.

Sec. 23. (Omitted as having no bearing on the case.)

Sec. 24. (As amended.) After the board of supervisors have certified the total levy of the costs and expenses of the drainage improvements to the county clerk as directed by section 18, they may proceed to let a contract for the construction of such improvements; * * *. The work shall be done under the direction, and to the satisfaction of the drain commissioner, and subject to the approval of the board.

Sec. 25. None of the provisions of this act shall be construed as repealing or in any wise modifying the provisions of any other act relating to the subject of draining, reclaiming, or protecting swamp, overflow or submerged lands * * *.

Sec. 26. Omitted as having no bearing on the case.

Sec. 27. The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or water course * * * shall have the right to use the ditch or water course as an outlet for lateral drains from said land, lot or premises.

Sec. 28. If any person who owns land within the drainage district which has been assessed for benefits and which is separated from the ditch, drain or water course for which it has been assessed, by the land of another or others, shall desire to ditch or drain his land across the land of such other or others into such ditch, drain or water course * * *, he may proceed in the manner in this act provided, and the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established. He may file his petition with the clerk of the district court asking the said court to establish a subdistrict within the limits of the original district for the purpose of securing more complete drainage * * *; and all proceedings shall be the same as herein provided, for the establishment, formation and construction of original dis-

tricts and improvements thereof, including the assessment of benefits and when established and constructed, it shall be * * * a part of the drainage system of such drainage district and be under the control and supervision of the board of supervisors.

Sec. 29. The treasurer of the county in which the drainage district, or the largest portion thereof, is situated, shall be *ex-officio* treasurer of said drainage district; for the purposes of collecting and disbursing said tax or assessment, * * *. It shall be the duty of the treasurer, who is *ex-officio* treasurer of the drainage district, to pay any money in his hands, * * * upon warrants, signed by the chairman and attested by secretary of the board of supervisors of the district, when the same shall be presented for payment * * *.

Sec. 30. Omitted as having no bearing on the case.

Sec. 31. (As amended.) The board of supervisors, except where otherwise provided, shall, by resolution, at the time of hiring or appointing, provide for the compensation for work done and necessary expenses incurred by any officer, engineer, attorney, or other employee, and shall also pay the fees of all court and county officers who may by virtue of this act render service to said district.

Sec. 32. If at any time after the final construction of said improvements the same shall become out of repair, obstructed, inefficient, or defective from any cause, the said board of supervisors may order an assessment upon the lands * * * for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property * * * as a basis to ascertain the ratio that each separate tract or lot of land or property bears to the whole amount to be levied and * * * shall fix and determine the amount of the assessment or tax that shall be levied against each separate piece of property * * * and to meet the requirements of this act, which * * * shall be limited to the amount necessary to make and complete said repairs, remove said obstruction, or remedy any such defect, or defects, * * *.

Sec. 33. * * * the board of supervisors shall have the power to appoint not more than three overseers * * * whose duty it shall be to keep the ditches, drains, dykes

and other works erected or constructed for the reclamation of the lands in the drainage district in good repair; * * *.

Sec. 34. Omitted as having no bearing on the case.

Sec. 35. Omitted.

Sec. 36. The collection of assessments * * * shall not be enjoined nor declared void; nor shall said asssessment be set aside in consequence of any error, omission, or irregularity committed or appearing in any of the proceedings provided for by this act, and no injunction shall be allowed restricting the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from said district in any action brought for that purpose in case said injunction is made perpetual.

Sec. 37. Declares the organization to be a body politic and corporate.

Sec. 38. Repeals chapter 116 of the laws of 1903.

Sec. 39. Is an emergency clause.

**(1) The Private Nature of the Organization is Shown by the Phraseology and Manifest Purpose of the Statute.**

The phraseology of the statute clearly denotes the private nature of the organization to be created under it.

By section 1 "a majority in interest of the owners of any contiguous body of swamp or overflowed lands of this state * * * may form a drainage district for the purpose of having such lands reclaimed, and protected from the effects of water by drainage or otherwise." The organization is to be brought into existence by signing and filing articles of association in the district court in the nature of a petition in a civil action which shall contain, among other things: "The name or names and description of the real estate owned by such as do not join in the organization * * * but who will be benefited thereby." And the persons signing the same are to "obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the im-

provements that may be necessary to effect the drainage of said land * * * , praying that they may be declared a drainage district under this article."

Section 2 has reference to the issuance and service of a summons upon land owners "who may be averred to be benefited thereby but have not signed said articles of association." And the summons shall contain a notice "to the several owners of real estate * * * who may be averred to be benefited thereby, but have not signed said articles of association * * * setting forth * * * that the articles of association * * * have been filed and the purpose thereof and that the real estate of such owner, or owners * * * will be affected thereby and rendered liable to taxation or assessment for the purpose of draining said district.

Section 3 affords unwilling land owners an opportunity to file objections and show "why their lands will not be benefited by drainage and should not be embraced in said drainage district and liable for taxation for draining the same" but if they fail to satisfy the court," and "such objections are overruled, the district court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state."

The most significant paragraph in the entire act is in this language in section 3:

> The fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for.

The private nature of the organization is manifest in section 5, by which the clerk of the district court is to call an election "for the purpose of electing five supervisors * * * and

* * * each and every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in such district." The supervisors are to hold their respective offices for "one, two three, four and five years, and until their successors are elected and qualified."

By section 6 it is provided that "such owners shall meet and elect one supervisor in like manner as in the preceding section, who shall hold his office for *five* years, and until his successor is elected and qualified."

It is provided in section 8 that after the election of the board of supervisors they shall choose one of their number as chairman and another as secretary, and provision is made for their payment and the payment of clerical help, a secretary and an attorney.

By section 9 surveys, maps and profiles are to be made by an engineer containing "a plan for draining, reclaiming and protecting the lands * * * from the overflow of or drainage by water or floods," and submitted to the board. The engineer is to estimate the cost of the "improvements required * * * to protect and reclaim said lands and property," and to inspect and examine the lands, and "assess * * * the amount of benefits which will accrue to each tract or parcel of land * * * by virtue of the works and improvements of said drainage district." It is declared that: "Each tract or parcel of land * * * shall bear its share of the entire cost and expenses incurred * * * in making said works and improvements in proportion to the benefits assessed whether such improvements be made on the tract or parcel of land * * * or not." In estimating the benefits: "The engineer * * * shall not consider what benefits will be derived by said lands after other ditches, * * but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage or an outlet for drainage, or protection from overflow or damage by water." It is declared that "all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage or giving an outlet for drainage, protection

from overflow and damage from water." It is further said in section 9 that: "The lots, tracts and lands receiving the greatest percentage of benefits shall be classified at 100, those receiving a less percentage * * * at such less number as its benefits may determine."

The board of supervisors are required, by section 10 to appoint a drain commissioner who is to let the drainage contract subject to their approval and to superintend all works of construction.

Section 11 is significant. It is there stated that if; "It shall appear that lands other than those incorporated by the court in said district will be benefited by the drainage improvements of said district, it shall be the duty of the chairman of said board of supervisors to file a petition in the district court of the county where said district was originally organized containing a description of said lands, * * * and alleging that said lands will be benefited by the improvements and ought in justice bear its proportion of the expense and cost of such improvement, and that said lands were not incorporated within the limits of the said drainage district as originally established by said court * * * and praying that said tract or tracts * * * may be incorporated and made a part of said district." Upon filing such petition (and here the articles of association are for the first time denominated a petition) it becomes the duty of the clerk of the court to "issue a summons as provided in section 2, * * * and the same proceedings are to be had upon the petition as were had upon the original petition" for the establishment of said district; and the same provisions of law shall apply, so far as the same are applicable. Provision is then made for hearing the case at chambers and making "all necessary orders, judgments and decrees." Upon filing a petition it becomes "the duty of the clerk to docket said cause, as a proceeding in and part of the original cause for the establishment of said district." On entering a decree to that effect, the land and all parties brought into said district thereby, are subject "to the same provisions of law as would have applied to them had they

been incorporated in the original petition and decreed entered therein."

Section 12 provides for the exercise of eminent domain over land, "whether the same be within the limits of such district or outside of its boundaries."

Section 13 deals with objections to the report of the engineer, "by the owner or owners of * * * land, property, easement or franchise upon which the said engineer proposes an assessment for benefits," as to the fairness and justness of the classification, and "as to whether the said proposed assessment of benefits exceeds the benefits derived to their respective lands, and property from said drainage improvements." Notice is to be given of the time and place of the hearing.

Section 14 has reference to the proceedings to be had before the board of supervisors on the subject of assessments.

Section 15 has reference to the actual hearing of objections by the board of supervisors upon which issue has been taken, and provides for the subpoenaing and examination of witnesses, etc. The board is authorized to "adopt, amend, modify or reject the plan for the reclamation and protection of the lands and property * * * recommended by the * * * engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken * * * and to estimate the cost thereof." From their decision there is no appeal, but the "board may modify their order should modification be necessary to promote the welfare of the drainage district." Other property, in the proposed district, may be assessed for drainage improvements. The board of supervisors may, "if they find the said classification or assessment of benefits to the lands and other property to be in any respect inequitable, either less than, or in excess of the benefits accruing to said lands and property * * * adjust and equalize the said classification and benefits as may appear fair, just and equitable to them."

Section 16 is a drastic provision respecting the taxation of costs of a hearing before the board of supervisors.

Section 17 contains a provision that if a land owner, who has filed objections and had a hearing, feels aggrieved by the decision of the board of supervisors, he may appeal to the district court upon giving the ordinary appeal bond: "And in addition thereto conditioned that they (he) will pay all damages which may accrue to said drainage district by reason of said appeal." A transcript is to be filed in the district court where the case is to be heard summarily without a jury, with authority in the court to "increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable."

Section 18 deals with the levying of a tax after the adjudication and establishment of the classification as provided in section 15 and provides that the board of supervisors may "at once levy a tax on the lands and other property * * * to which benefits have been assessed * * * in the completion of said work and improvements and the carrying out the objects of the said district." This tax is to be certified to the county clerk of the county in which the lands are situated. And it is provided that: "If * * * the cost of the drainage works and improvements exceeds the amount of the tax levied against the lands and property in said district * * * the board of supervisors may levy such other and further installments as may be necessary to complete the said works and improvements, but * * * shall in no event exceed the total amount of benefits assessed to the lands and property in said district." Taxes are to be levied annually thereafter to meet the current expenses and bonded indebtedness. The tax or assessment is to be carried on to the county tax books against "the property" in the manner of other taxes and collected by the county treasurer. The county clerk is to be allowed fees as for like services in other cases.

By section 20 the board of supervisors are authorized to issue the negotiable bonds of the proposed district for the amount of the tax certified by the county clerk as provided in section 18, to bear not exceeding 6 per cent interest and to mature at annual intervals after five years. The bonds are to

contain a recital that they were issued under this act, and are to be sold for not less than par value and "before such bonds are sold or negotiated" they "shall be presented to the auditor of public accounts and he shall examine such bonds and all the proceedings relative to their issue, and if he be satisfied that such bonds have been legally issued * * register the same in his office in a book kept by him for such purpose." The bonds can not be sold until this is done. It is then provided, "that before such bonds are issued any person or corporation whose lands or property has been assessed for benefits by said district, may pay the total amount of the cost and expenses."

By section 21 the assessment is made a lien against the property assessed and is to draw 10 per cent interest, and the lien shall not "be removed until the assessments are paid or the property sold for the payment thereof, * * and the revenue laws of the state for the collection and sale of land for such taxes are hereby made applicable to the collection of assessments under this act."

By section 22 the board of supervisors may sell the district bonds from time to time; but before doing so "the board shall * * * by resolution declare its intention to sell a specified amount of the bonds" and the same shall be entered on the minutes, and twenty days' notice of said sale is to be given of the time and place when the bonds will be sold. The money is to be deposited in a local bank or trust company to be drawn when ordered by the board on a check or warrant signed by the chairman and countersigned by the secretary.

By section 24, "after the board has certified the total levy of the costs and expenses of the drainage improvements to the county clerk * * * they may proceed to let a contract for the construction of such improvements." And it is provided that the work shall be done under the direction and to the satisfaction of the drain commissioner, subject to the approval of the board.

That no conflict may exist between this act and other statutes on the subject, it is provided in section 25 that: "None of the provisions of this act shall be construed as repealing or in any wise modifying the provisions of any other act relating to the subject of draining, reclaiming, or protecting swamp, overflow or submerged lands."

By section 27 the owner of any land which may have been assessed "for the payment of the cost of the location and construction of any ditch, drain or water course * * shall have the right to use the ditch or water course as an outlet for lateral drains from said land, lot or premises"—thus inferring that no other person can use the drain.

Section 28 is significant, in that it provides that a land owner in the district, who desires to construct a drainage ditch across the land of his neighbor, may, by a proceeding in court of the same kind adopted for the organization of the district and the bringing of outlying territory within the district, secure a right to do so. And here, for the first time, we read, "and the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established." The idea of a public purpose was greatly belated in the draft of the measure. The land of such an owner becomes a subdivision or part of the drainage district and under the control of the board of supervisors.

By section 29 the county treasurer is made *ex officio* treasurer of the district, for the purpose of collecting and disbursing taxes, and it is his duty to pay any money in his hands upon warrants signed by the chairman and secretary of the board when presented for that purpose.

Section 31 authorizes the board of supervisors, by a resolution, to provide for the compensation of work done and necessary expenses incurred by any officer, engineer, attorney or other employee and also to pay the fees of all court and county officers who may by virtue of this act render service to said district.

By section 32 it is stated that: "If at any time after the final construction of said improvements" the same shall become out of repair, obstructed," etc., an assessment may be levied against the lands for the purpose of placing them in proper condition.

Section 33 contains a provision for the appointment of overseers "whose duty it shall be to keep the ditches * * * and other works erected or constructed for the reclamation of lands in the drainage district in good repair, and to cause the arrest of persons who may damage or obstruct ditches, etc., or other works erected or constructed for the reclamation of lands as aforesaid."

Section 36 is a highly drastic provision against permitting anybody to enjoin the collection of assessments, and says: "that the collection" shall "not be enjoined nor declared void; nor shall said assessment be set aside in consequence of any error, omission, or irregularity committed or appearing in any of the proceedings provided for by this act, and no injunction shall be allowed restricting the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from said district in any action brought for that purpose in case said injunction is made perpetual."

Section 37 declares the proposed district to be a body corporate and politic under a name and number to be given to it, and that it shall have power and authority "to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, have and use a corporate seal and exercise any and all other powers as a corporation, necessary to carry out the purposes of this act."

The following expressions found in the act, are indicative of the nature and purpose of the organization to be created under it: "for the purpose of having such land reclaimed," (Sec. 1); "will be benefited thereby." (Sec. 1);

"to pay the expenses to make the improvements that may be necssary to effect the drainage of said lands," (Sec. 1); "who may be averred to be benefited thereby," (Sec. 2); "who may be averred to be benefited thereby," (Sec. 2); "will be affected thereby," (Sec. 2); "for the purpose of draining said district," (Sec. 2); "will not be benefited by drainage," (Sec. 3); "taxation for draining the same," (Sec. 3); "will not be benefited thereby," (Sec. 3); "a plan for draining, reclaiming, and protecting the lands," (Sec. 9); "to protect and reclaim said lands and property," (Sec. 9); "benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage etc.", (Sec. 9); "assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements, etc.", (Sec. 9; "the greatest percentage of benefits," (Sec. 9); "will be benefited by the drainage improvements of said district," (Sec. 11); "alleging that said lands will be benefited by the improvements," (Sec. 11); "drainage improvements," (Sec. 13); "plan for the reclamation and protection of the lands and property," (Sec. 15); "benefits to the lands and other property," (Sec. 15); "increase or reduce the amount of benefits," (Sec. 17);; "to which benefits have been assessed," (Sec. 18); "works and improvements and the carrying out of the objects of said district," (Sec. 18); "necessary to complete the said works and improvements," (Sec. 18); "the property to be benefited," (Sec. 18); "assessed for benefits by said district," (Sec. 20); "expenses of the drainage improvements," (Sec. 24); "for the payment of the cost of the location and construction of any ditch, drain, or water course," (Sec. 27); "final construction of said improvements," (Sec. 32); "or other works erected or constructed for the reclamation of lands as aforesaid," (Sec. 33); "necessary to carry out the purpose of this act," (Sec. 37).

When a court has ascertained the purpose of a statute and applied it to a case in hand, it has performed its full duty.

The rule of interpretation is thus stated by Chief Justice Marshall, in *The United States v. Fisher*, 2 Cranch 358, 386:

> It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.

And in the same case Mr. Justice Washington says:

> Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction. But if, from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature.

I insist that following the rule thus announced but one interpretation can be given to the act in question, and that is that it authorizes an essentially private organization for a strictly private purpose and is, therefore, in violation of the federal Constitution and void.

**(2) Other Cognate Facts Indisputably Point to the Private Nature of the Organization.**

I think the most painstaking critic will search in vain for any public purpose to be served by an organization created under this act. Such organization is not a road district, a school district, an incorporated municipality, a township precinct, or county, and therefore, not a political subdivision or agency of the state. It can not levy taxes for roads, schools, municipal, township, precinct, county or state purposes, nor does it expend money for any public enterprise. It is in no sense a governmental aid or agency.

It is without a magistracy or a constabulary. It does not build, maintain, or conduct schools, or hospitals, or engage in furnishing water for general consumption, or for power or municipal purposes or to float canal boats. In a

word, it performs no public mission and has no public object in view. It is *inter se* a private organization for the purpose of "benefiting" or enhancing the value of the private estates of "a majority in interest." It is unique, in that it is not established by a vote of the electors or of individual land owners in the territory, but is based on the acreage owned by individuals, which may be held by persons, or by a domestic or foreign corporation, an imbecile or infant under guardianship, or by the estate of a deceased person.

If we inquire what public use is to be served by such a creation, the only possible answer that could be made is that it will benefit the real estate of "a majority in interest" by increasing its value and productiveness. And here we pass the line between a public purpose or use, and a private purpose or use; but every use, however private, promotes, in a measure, the public welfare by adding to its store of wealth and enjoyment. This is true of a theater, a hotel, a bank, a cafe, a hack line and of hundreds of other occupations and callings essentially private in their nature. In fact there is not an honorable or necessary vocation into which a citizen may enter that does not promote the public interest in the sense of adding to the general welfare of many people. But such is not the public use meant by the constitution.

If "benefiting" or increasing the value of the holdings of private citizens by draining their real estate to make it more productive, is a public use, within the meaning of the constitution, then the building of farm houses and fences and the cultivation of lands, the leveling of hills and filling of valleys, thus bringing private property into a state of productiveness, would equally serve a public purpose.

Suppose the legislature had passed a statute, substantially in the words of this act, declaring that those constituting "a majority in interest" of given rough, hilly, or mountainous land, might, by judicial order or decree, form a corporation to cut down the mountains and hills and fill in the ravines and valleys and level the lands of others at the common expense. Would that be a public purpose within

the meaning of the constitution, if it were declared that the land would be "benefited thereby?"

Suppose again that lands lying within the limits of a proposed drainage district are drained and made more productive and therefore more valuable, and would, in that sense, be "benefited thereby" can it be said that the public welfare would be promoted thereby? How promoted, except that such lands would produce larger crops, which in turn would swell the volume and value of the commerce of the locality or of the country, only to find lodgment in the pockets of the owners and no part of it devoted to a public use? Many authorities to which I shall refer have answered this question.

Again, if it should be asked how the defendants are to drain their lands, I reply that, while that is a secondary and unimportant question, it can be done under the act of 1907 and other subdivisions of chapter 19 of the Revised Statutes of 1913. But in that case the property of a reluctant adjacent owner could not be brought into the organization, or be bound by its assessments, taxes, or bonded indebtedness without his consent. Those whose property would be "benefited," would, as in justice they should, be required to bear the burdens and inconveniences of the enterprise.

Now what necessitated a change, by the act in question, of the long established right of the citizen to vote *per capita* and vest that right exclusively in "a majority in interest?" "A majority in interest," as shown by section 5, and by section 20 of the old act is the number of acres of land one man, or interest, may own, regardless of its value. The object, therefore, of the measure was to muzzle the dissenting land owner and hand him over bound hand and foot to "a majority in interest," and thus deprive him of expressing his wishes and of conserving his own interests. In every other instance of which I have had any knowledge, or can now recollect, a vote is to be taken *per capita*. But in this instance there was a necessity for depriving the citizen of

his undoubted right by the enactment and enforcement of this statute.

It must be remembered that "a majority in interest" does not mean a majority of electors having the greatest number of acres; but may mean an imbecile or an infant under guardianship, or a domestic or foreign corporation acting through agents, or the estate of a deceased person acting through an administrator or executor. That of one hundred and twenty-nine land owners of the territory sought to be embraced in the proposed district, presumably, a majority are electors under the laws of Nebraska and of the United States, but the act prevents them from safeguarding their rights.

It is well known that lands in the same general locality possess different values. The owner of "a majority in interest" or a majority of the acreage, whose holdings may be swamp land and bought at swamp land prices and of comparatively small value, may control adjoining estates of great value but having fewer acres under this measure. In other words, the manifest purpose of the act is to give one man, corporation or association owning swamp lands, the right to coerce neighboring owners of valuable and productive property into corporate relations which they refuse to voluntarily enter, that he may drain his lands at their expense.

It is understood that the constitutionality of an act is not tested by what has been done under it in the instant case, (*Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 464; *Montana Company v. St. Louis Mining & Milling Company*, 152 U. S. 160, 38 L. ed. 398) but by what may be done under it.

Take another illustration, which falls clearly within the language and policy of this measure. It is observed by section 5 that the board of supervisors, which is elected by "a majority in interest," or acreage, are to hold their offices

for "one, two, three, four and five years, and until their successors are elected and qualified"; and by section 6 "that every year after the election of the first board of supervisors, such owners shall meet and elect one supervisor in like manner as in the preceding section, who shall hold his office for *five* years and until his successor is elected and qualified." "A majority in interest," having thus elected the board of supervisors that board has control of the organization.

Now suppose that A being a "a majority in interest," owns 1,000 acres of overflowed lands of the value of $10 per acre, or $10,000, and B, C, D, E, and F, respectively, own a quarter section not to exceed twenty per cent of which is overflowed, of the value of $100 per acre or $80,000. In such a case it will be observed that a tract of swamp land of inconsiderable value can bring $80,000 worth of valuable real estate into corporate relations over the protest and against the objections of the owners.

Now "a majority in interest" having organized and obtained control of the district by the election of the board of supervisors, may, in the course of three years, bring in a half section or more of other valuable land under the provisions of section 28. By that time that which was originally "a majority in interest" and elected three members of the board of supervisors for *five* years and issued a bonded indebtedness, levied taxes and assessments, becomes a minority in interest, but the annexed territory with the objecting land owners, which has become "a majority in interest," is dominated and controlled by the original board. Thus we may have the anomaly, that the owners of the greater number of acres having a greater value, but who do not desire to have their estates brought into corporate relations with others and who protested against it, are forced, by this act, to enter such relation. Their property thus becomes burdened with taxes and assessments for a period of twenty years, the duration of the corporation, and made unsalable

and undesirable, with no object in view but that of promoting the private interests of the owners of the swamp land.

No man can be coerced into corporate relations with others and to assume and perform the duties and burdens of that relation. *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 708, 4 L. ed. 629, 676; 1 Morawetz on Private Corporations, (1886) Sec. 24; *Ellis v. Marshall,* 2 Mass. 369, 3 Am. St. Rep. 627, 630; *Gardner v. Hamilton Ins. Co.,* 33 N. Y. 421; Marshall on Corporations, (1902) Sec. 195, pp. 495, 496; *In re Village of North Milwaukee,* 67 N. W. (Wis.) 1033; *Territory ex rel Kelly v. Stewart,* 1 Wash. 98, 23 Pas. 804, 8 L. R. A. 106; *Glaspell v. City of Jamestown,* 88 N. W. (N. Dak.) 1023.

Again, it is elementary that land can not be taken under the power of eminent domain, unless it is thereafter to be devoted to the use of the public independently of the will of the person or corporation taking it. *Berrien Springs Water Power Co. v. Berrien Circuit Judge,* 94 N. W. (Mich.) 379, 380; *Ryerson v. Brown,* 35 Mich. 333, 34 Am. Rep. 564; *Board of Health v. Van Hoesen,* 49 N. W. 894, 14 L. R. A. 114. And that a use which may be monopolized or appropriated by a few and from which the general public may, or must, alternately, be excluded, is in no sense a public use. *Board of Health v. Van Hoesen,* 14 L. R. A. 114. It is not made a public use by the fact that the public has a theoretical right to use it. *Pittsburg etc. R. Co. v. Benwood Iron Works,* 2 L. R. A. 680. The state must have a voice in the manner in which the public may avail itself of the use. *Board of Health v. Van Hoesen,* 49 N. W., 894, 14 L. R. A. 114; *Kettle River R. Co. v. Eastern R. Co.,* 43 N. W. (Minn.) 469, 6 L. R. A. 111; *In re Burns,* 155 N. Y. 23; *Pocantico Water Works Co. v. Bird,* 130 N. Y. 249; *In re Niagara Falls R. Co.,* 108 N. Y. 375; *In re New York, etc. R. Co.,* 99 N. Y. 12, 24; *In re Eureka Basin Warehouse Co.* 96 N. Y. 42; *Bridal Veil Lumber Co. v. Johnson,* 34 L. R. A. 368; *In re Rhode Island Suburban R. Co.,* 52 L. R. A. 879.

Now apply these rules. Suppose that an adjoining owner of land subject to overflow, should desire to bring his real estate within the organization, and should make application for that purpose. To whom would he address the application and who would have authority to act upon it? The statute is silent in this respect and confers no power on the officers to admit outlying territory, except in the manner provided in section 11, and then the authority is vested exclusively in the "chairman of said board of supervisors." But if he should refuse to institute proceedings for that purpose, there is no authority to compel him to do so.

Again, suppose that such land owner, realizes that his property can only be brought into the district by the chairman of the board of supervisors in the manner pointed out in section 11, but the chairman refuses to take the necessary steps for that purpose and the land owner should attempt to drain into the corporate ditch, he would find himself unable to do so, because of the restriction in section 27 that that right is confined to persons who have been assessed for the payment of the cost of the location and construction of the ditch. The statute fails to reveal a reservation of the right of visitation. But if it should be held that the state possesses that right, it could only be exercised by further legislation, or by legal proceedings to dissolve the organization.

It is provided in section 27 that: "The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or water course * * * shall have the right to use the ditch or water course as an outlet for lateral drains from said land, lot or premises." So again the private nature of the organization is shown by an attempt to stifle all inquiry respecting the legality of its creation. This is stated in section 36 to which I have made reference, which attempts to prohibit legitimate litigation involving its validity.

The private purpose is also shown in section 5 which likens the voting force of an acre of land to "one share" of stock, and by section 12, which provides that: "If the damages are not so paid within two years from the filing of such commissioners' reports, all proceedings as to the right of way not paid for shall abate to the cost of the district," and by the "petition and articles of association" (exhibit "1," record pp. 24-26, fols. 39-42). Such provisions are not found in the charter of a municipal corporation, or in the statutes creating political organizations.

The coercive character of the organization is clearly deducible from the following facts, which are in no manner applicable to a municipal corporation, or other political, or quasi-political subdivision of the state. A condemned right of way which is not paid for in two years "shall abate at the cost of the district" (section 12). Persons not interested in the district have no right to inspect its records (sections 8, 13, 20). The organization exists for only twenty years and the articles of association must recite the period of its existence (section 1). The method of organization by an action in court is unique and in no sense applicable to any other corporation (section 1). By that means it is sought to prevent all inquiry into the regularity and validity of the organization before the question arises in actual litigation. The same conclusion is deducible from the old acts. Thus by the act of 1903 (section 1) the minimum size of the district was to be six hundred and forty acres. But by the act of 1905 (sections 1 and 2), the minimum was reduced to a quarter section. By the act of 1903 the board of supervisors could issue the bonds of the corporation only on the petition of two-thirds of the acreage (section 14), but by the act of 1905 this was changed to a majority of the acreage (section 20), and it was entirely omitted in the amendment of 1909 and that power was placed in the hands of the board of supervisors (section 20), who are elected by "a majority in interest." By the act of 1903 (section 14), the bonds could not exceed "six dollars per acre" upon all land in said district for the entire period,

or fifty cents per acre per year; but in the act of 1905 this provision is omitted and no limitation is fixed, except that the bonds shall not exceed the "benefits derived."

If to the sentence "a majority in interest of the owners of any contiguous body of swamp or overflowed lands in this state, * * * may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water," as found in section 1, the legislature had added the words "for the purpose of making the same more productive and valuable," there could be no reasonable doubt of the unconstitutionality of the measure. That such is its real purpose is to be read in almost every sentence. The private nature of the organization is clearly stated in this language in section 3:

> The fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state.

By this means it is sought to take from the court the right to interpret the statute and to bind its judgment by a legislative declaration, when it is well known that if the legislature can make its construction binding on the courts the latter would simply become a legislative branch of the government, or, at least, its passive agent to carry out its express wishes.

If the act were intended in good faith to promote the public health, or general welfare some mention of that fact would be found in the first four sections, or in section 11, which requires the chairman of the board of supervisors to bring outlying territory into the district by a like proceeding in court, when it is made to appear that it "will be benefited by the drainage improvements of said district." But no mention is made of that matter until we reach section 28, by which it is provided that one person owning lands in the district may, by a like proceeding in court, condemn a right

of way and dig a ditch across his neighbors' lands. Then it is said: "And the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, convenience and utility to promote which said drainage district was established."

The legislature can not by mere fiat, make a private use a public use. *In re Schubert,* 114 N. W. (Minn.) 244, 245; *Brown v. Gerald,* 70 L. R. A. 472; *Fanning v. Osborne,* 102 N. Y. 441, 448; *State v. Bancroft,* 134 N. W. (Wis.) 330, 339; *Dodge v. Mission Township,* 107 Fed. 827, 829. The declaration, therefore, of section 28 is in conflict with the language, policy and drift of the entire act and possesses no force.

So that the statement in section 28 that an owner "within the drainage district" whose land "has been assessed for benefits" may, by judicial decree, secure the right to construct a ditch across his neighbor's land, which "shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established;" when placed in juxtaposition with the declaration in section 3 that, "the fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state," and with similar statements in other parts of the statute, leaves no doubt that the purpose of the act is to authorize the creation of a private corporation to enhance the value of the property of the incorporators. And this purpose is not hidden or secreted by the quoted declaration in section 28.

The statute provides that railroads, counties, townships, cities and villages shall be assessed for the expenses of railway, highway and street crossings, and in this respect it strongly resembles a Kentucky statute which was held unconstitutional and void in *Cypress Pond Draining Company v. Hooper, et al.,* 2 Met. (Ky.) 350, 356, in which it is said:

We need not comment upon some of the extraordinary provisions of the act of incorporation, by which the six managers named in the act are given full power to assess and appropriate the taxes, to fill all vacancies in their own body, and, in short, to control and manage the entire business of the corporation, the other members having no voice or agency whatever in the management.

**(3) The Private Nature of the Organization as Shown by the Authorities.**

In addition to the citations on pages 71 to 78 of the plaintiff's brief, I add the following:

In 1 Lewis on Eminent Domain, (3 ed.) after showing that the doctrine of public use is in confusion, the author says (Sec. 257):

> The different views which have been taken of the words "public use" resolve themselves into two classes: one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility, or advantage. * * * On the other hand, numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or of public agencies, or the public must have the right to use in some way the property appropriated.

He suggests that it is impossible to reconcile the different views (Sec. 258), and says:

> The public use of anything is the employment or application of the thing *by* the public. Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

And adds:

> If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retains certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use and the act of appropriation is void. This interpretation will cover every case of appropriation that has been deemed lawful by any court, except a few in relation to mills, mines, and drainage. If exceptional circumstances require exceptional legislation in those respects in any state, it is very easy to provide for it specially in the constitution, as has been done in several states.

In Nichols' Power of Eminent Domain, (1909), p. 274, the author says:

> *The power of eminent domain can not be constitutionally employed to enable individuals to cultivate their land or carry on their business to better advantage even if the prosperity of the community will be enhanced by their success;* but when the public welfare depends upon an undertaking which can not succeed without taking rights in private land, the courts will allow such taking, especially if it is sanctioned by usage contemporary with the adoption of the constitution.

The mill-dam cases are placed on exceptional grounds. 1 Lewis on Eminent Domain, (3 ed.) Secs. 275-280, pp. 544-558; Nichols' Power of Eminent Domain, (1909), Secs. 242-246, pp. 280-288. And the courts are divided as to the constitutionality of mill-dam acts. 1 Lewis on Eminent Domain, (3 ed.) Secs. 277-278, pp. 548-551.

In 1881 the Nebraska court, by Chief Justice Maxwell, decided *Jenal v. Green Island Drainage Company*, 12 Neb. 163, which involved the constitutionality of a statute which provided that: "Any number of persons not less than three, being owners of lands wet or liable to be overflowed, may organize a company for the purpose of draining, reclaiming

and protecting such lands," and exercise the right of eminent domain. The act was held unconstitutional as authorizing the taking of private property for a private use (pp. 166-167). That case has been frequently cited, and, while distinguished in some cases, has never been overruled.

In 1887 the *County of Dakota v. Cheney*, 22 Neb. 437, was determined, the opinion being by Chief Justice Maxwell also, in which a drainage statute providing that "if the improvement is necessary or will be conducive to the public health, convenience, or welfare," was sustained. But the question here involved was not discussed or decided (pp. 446-447).

In 1891, *Darst v. Griffin*, 31 Neb. 668, was decided, the opinion being by Maxwell, J., but the question here involved was neither argued nor decided.

In 1908, *State v. Hanson*, 80 Neb. 724, *et seq.* was decided, the opinion being by Commissioner Epperson. It involved the constitutionality of the drainage act of 1907, the opening expression of which is, "Whenever it shall be conducive to the public health, convenience or welfare, either to drain any wet land, or to drain any land subject to overflow by water," (p. 725), (Revised Statutes 1913, Subdivision 5, pp. 526-537).

Speaking of the difference betwen a public and private corporation, it is there said (p. 728):

> It is within the power of the legislature to further the public health, convenience or welfare by the enactment of drainage laws or providing for the protection of property by dykes and levees.

But it is added (p. 729);

> *A few individuals can not for their private purposes create a drainage district and impose burdens thereof upon their neighbors. Neither can a few or many, acting in their individual interests, prescribe the boundaries of the proposed district.*

It is further said (p. 730):

> That the legislature may delegate to administrative officers the power to determine whether a particular proposed improvement will be conducive to the public health, convenience, or welfare is an established rule. The same

function may be delegated to the electors of a municipality. * * * (p. 740). *It is equally well settled that the machinery of the government will be thus placed in operation only when the contemplated reclamation or protection by drainage * * * and other similar improvements are necessary in order to promote the public health, convenience, or welfare, and that individuals can not through the agency of the government thus improve their own property when the public health, convenience, or welfare will not be promoted thereby.*

In *Rutherford's Case*, 72 Pa. St. 82, 13 Am. Rep. 655, 657, it is said:

> This act applies to contiguous swampy lands belonging to *several owners disjointly*, and that have been once drained. There is nothing in the law, or in this proceeding, to indicate that the owners of such adjoining lands are under a common duty to drain their lands, either by contract with each other, or by reason of a burden imposed, by a common predecessor in an entire title, under which all claim their several parts. * * * (p. 658). *The case therefore stands simply in the attitude that a law commands an owner of land, by a several and unconnected title, at his own expense, to drain his land, for the private and individual benefit of his neighbor, in the manner and to the extent that the commissioners shall direct, in a proceeding ex parte, and without notice to him, under a penalty of $10 a day, for his omission to drain it, after notice of the ex parte determination of the viewers, and a certain time elapsed. * * * This is an interference with private right not within the grant of legislative power. True, it may be greatly to his neighbor's advantage he should do this; and so it would be to keep an open way in good repair over his land, for his neighbor's benefit, and which his neighbor had been using, but without title. But men purchase land with their eyes open, and if it be swampy, or hilly, or stony, or otherwise less valuable than their neighbors', they take it as it is, and can not call upon their neighbors to help them to level it, or drain it, or pick the stone from it.* * * The whole proceeding under this act is not only out of the course of the common law, but is out of the due course of law. It imposes a burden without a duty, and without notice of the proceeding which

imposes it; and for a refusal to bear it, it exacts a severe penalty without a previous trial.

In *Anderson v. Kerns Draining Company*, 14 Ind. 199, 77 Am. Dec. 63, it is said in the syllabus:

> Draining of marshes and ponds for promotion of public health is a public object for which taxes may be assessed. *But the draining of farms to render them more valuable to the owners is not a work of public utility, and a corporation organized for such purpose could not collect a tax to pay for the work.*

And it is further said (pp. 65-66):

> But private property must be taken only for public use, and local taxation must be permitted only to defray expenses in cases of public use and benefit. And if the tax assessed in the case at bar was for such public use and benefit, the mode of its assessment, it seems, was unobjectionable: *People v. Mayor, etc.*, 4 N. Y. 419; *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Id. 166. What is to be regarded as a public object in the taking of private property and in the assessment of taxes, is a question of great difficulty in many cases. The building of mills has been held such: *Hankins v. Lawrence*, 8 Blackf. 266. The construction of canals and railroads and public highways has been held such: *Dronberger v. Reed*, 11 Ind. 420; so has the improvement of streets in a city, for they are public highways: *Snyder v. Rockport*, 6 Id. 237. So has the draining of marshes and ponds for the promotion of the public health: See *Hartwell v. Armstrong, supra.* But the draining of a man's farm simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation organized and acting for such a purpose would no more be acting in a public undertaking than would a company organized and acting for the clearing up of men's farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation. And forcible taxation to pay for the benefit would hardly be tolerated.

In *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398, it is said in the syllabus:

A grist-mill owned and operated by individuals who are compelled, by law, to grind well all grain received by them for that purpose, but are not compelled by law to receive grain for grinding, is not a "public" benefit in the constitutional sense; and an act of the legislature authorizing the flowage of lands (on payment of assessed damages), by maintaining a dam of sufficient height to run such mill, is an unconstitutional exercise of the right of eminent domain.

*Nickey v. Stearns Ranchos Co.*, 58 Pac. (Cal.) 459, *et seq.*, was a proceeding under "An act to provide a system of drainage for agricultural, swamp, and overflowed lands" to condemn lands of the defendants for the purpose of constructing a ditch. A judgment sustaining the defendants' demurrer to the complaint was affirmed in the supreme court in this language:

It is further insisted, however, that the demurrer was properly sustained because the proceedings which are the foundation of this condemnation suit were had under an unconstitutional statute. This contention we think is sound. The act of 1881, under which these proceedings were taken, provides that when "two or more owners shall petition the board of supervisors for a ditch, drain or other water course," the supervisors shall appoint a day for a hearing and give notice. Upon the hearing "if the supervisors shall find that the construction of the ditch would be conducive to the general welfare of the landowners so petitioning," surveys are to be made, stakes set, the work to be ordered done, and the cost apportioned upon the lands benefited and private property condemned for ditch purposes. But in this state private property may not be taken or damaged for private use at all. It may be taken only for public use after just compensation made or paid (Const. art. 1, sec. 14). It is beyond question that the digging and maintaining of ditches and drains across private lands is a taking of property. This statute may be read in vain to discover any expression or intimation that the taking in this case is for a public use. The proceedigs may be initiated by two men. They are required to be landowners, but so loosely is this statute drawn that it is not required that the land which they own shall be so situated as to be affected by the

proposed ditch. As authority for initiating the work, and for taking the land of a private owner for the indicated purposes, the supervisors have but to find, not even that the construction of the ditch will benefit the lands of the petitioners, but merely that it will "conduce to their general welfare." It is nowhere in the act expressed or contemplated that the interest or convenience of the public or of any community is to be subserved. Yet, excepting for these purposes, private property may not be taken. To the contrary, the very language of the statute negatives the idea that public interests are in consideration, since it imposes upon the supervisors the duty of ordering the work when they shall find that its construction will be conducive to the general welfare of the two or three or four persons who petition. Nor may this act be saved from condemnation because, while providing that only two landowners need petition, it contemplates that more may do so. It is not a question for the courts to say whether a petition by three or four or five or six or ten should be held to indicate that public necessity or convenience is involved. It is for the legislature in the first instance to show that the consideration for the taking of private property is a consideration of public necessity or convenience. *Johnson v. Schmidt,* (Wis.) 63 N. W. 288. We are not unmindful that this statute was attacked in *Holley v. Orange Co.,* 106 Cal. 420, 39 Pac. 790, and that its constitutionality was there upheld; but the points here presented were not in that case raised or considered. That determination was a decision, not generally as to the validity of the act, but merely that it was valid against the specific grounds of attack urged. It is of no binding force in this action, between different parties, and upon propositions neither presented to nor considered by this tribunal in the former action. *In re Central Irr. Dist.,* 117 Cal. 382, 49 Pac. 354; *City Council v. Fowler,* (S. C.) 25 S. E. 900.

In *Butler v. Supervisors of Saginaw County,* 26 Mich. 22, 29, the court considered the constitutionality of an act entitled, "An act to provide for paying the expense of certain ditches made under the drain laws of Saginaw county," respecting which it is said (p. 29):

> And it is averred as a fact, that they (the ditches) were constructed for the benefit of the lands drained, and

not because the lands injuriously affected the health of the inhabitants. *The admitted case is consequently, to the extent of such drains, one of purely private concern. We shall enter upon no argument to demonstrate that a tax can not be levied upon any portion of the public, for the construction of a drain in which the public are not concerned. Even the owner of the land benefited can not be taxed to improve it, unless public considerations are involved; but he must be left to improve it or not, as he may choose.*

In *The Attorney General v. The City of Eau Claire et al*, 37 Wis. 400, 401, it is said in the syllabus:

> But the maintenance of a dam for the purpose of leasing the water to private persons for private use is not a municipal or public purpose, for which a municipal corporation can be authorized to exercise the power of borrowing money and levying taxes. And *quaere*, whether such a corporation could be empowered to erect and maintain a dam for such a purpose independently of taxation.
>
> A statute which undertakes to empower a city to erect a dam, leaving it optional with the city whether the dam shall be used for a public or for a merely private purpose, is invalid.
>
> Where a statute purports to confer a power upon a municipal corporation, the public use or purpose must appear affirmatively from the statute.

In *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, in upholding a drainage act, the court said (p. 362):

> We neither hold nor mean to hold that benefit to the property of an individual will warrant an assessment; for if the benefit is solely to private property, irrespective of general or public considerations, no compulsory assessment would be valid, since one citizen can not be compelled to contribute to the improvement of another's property.

In *People ex rel Pulman v. Henion, et al.*, 19 N. Y. Supp. 488, it is said in the syllabus:

> Laws 1867, c. 372, entitled, "An act to provide for draining certain swamp lands situated in" certain towns, appointed three commissioners, and provided that they should estimate the cost of such drainage, and assess and

apportion such cost on the owners of the lands to be benefited; that these assessments should be a lien on the lands assessed; that the commissioners should publish a notice of the assesments, appointing a time and place at which such assessments would be received by them; and that, unless such assessments should be paid at the place and time so appointed they should then and there proceed to sell to the highest bidder at public sale the lands assessed. Held unconstitutional, because it sought to deprive the owners of such land of their property without due process of law (Const. art. 1, sec. 6), in that it gave the owners no opportunity to resist the assessment. Such act also provides that the commissioners may enter on any lands in or about a certain swamp for the purpose of constructing, maintaining, and repairing ditches thereon, and is therefore unconstitutional for the further reason that it seeks to take private property for private use without consent of the owner.

In *Smith et al v. Atlantic and Great Western Railroad Company, et al*, 25 Ohio St. 91, the constitutionality of an act entitled "An act to authorize the building and repairing of levees to protect land from overflow," was decided. The proceeding was by a petition before the county judge to appropriate the land and property of the defendant to build a levee along a river. Upon notice, the railroad company appeared and objected, for the reason, among other things, "Because the statute under which said levee is sought to be constructed is unconstitutional, etc." In holding the act void, the court said (p. 101, 102):

> The first question to be considered is, does the act authorize the entry upon lands and the location and construction of levees when demanded by private interest merely, without reference to the public welfare? The question, it seems to us, is fully and conclusively answered in the affirmative, by giving to the language used in the act its natural and obvious import. The public welfare is not within the purview of the act, either in express terms or by implication. The action of the probate judge is not limited by the act to cases only in which the location and construction of levees are demanded by the public welfare, "but under it, and without infringing any of its provisions, a levee might be located and constructed upon the lands

of individual owners, for purposes of private interest merely." It is claimed, however, by the plaintiff, that under the act, neither the location nor construction of a levee can be ordered by a probate judge, unless it be first found by him that the same is demanded by the public welfare, and in support of the claim, that portion of the act which enumerates the subjects to be embraced in the report of the jury is cited. We have looked in vain through the act, to discover the effect that a finding either way, upon the first two subjects required to be embraced in the report, was intended to have upon the finding and orders of the probate judge, made upon the hearing of the petition and the report of the viewers, both of which precede the impaneling of the jury, and neither of which is predicated upon any other ground than the necessity of such structure for the protection of the lands of the citizens named in the petition from overflow, or for the welfare of such citizens, or any of them.

In the important case of *Minnesota Canal & Power Company v. Koochiching Company, et al,* 107 N. W. (Minn.) 405, it is said in the syllabus:

In proceedings to condemn private property, every reasonable doubt as to the authority must be resolved in favor of the landowner. The statutes under which the petitioner is organized do not, as an incident to the construction of a canal and the creation of a water power, authorize a corporation to withdraw and divert the waters from public navigable lakes and streams to such an extent as to interfere with present or future navigation and by means of canals carry it over a divide and discharge it into a different drainage area, thus permanently withdrawing it from its natural course.

When the purposes stated in the petition are part public and part private, the right to proceed must be denied.

A use is not public unless, under proper regulations, the public has the right to resort to the property for the use for which it was acquired independently of the will or caprice of the corporation in which the title of the property vests upon condemnation. * * *

But the creation of a water power and a water power plant for the purpose of "supplying water power from the wheels thereof" to the public is a private enterprise, in aid of which the power of eminent domain can

not be exercised. The nature of water power is such that, under such conditions, it can not be used by the public to such an extent as to make the use a public use.

In 2 Farnham Water and Water Rights, (1914) Sec. 170, p. 903, it is said:

> His property may also be taken under the right of eminent domain if it is necessary to secure a right of way for a drain. But when the individual is placed at the mercy of what some public official may adjudge to be for the public welfare, the security of personal property is gone, and a doctrine which necessitates such a result is foreign to our system of government.

In section 171, p. 917, it is said:

> One man can not be compelled to drain his land for the benefit of his neighbor, except where the lack of drainage constitutes a nuisance which may be abated under the general principles governing the abatement of nuisances. Citing *Woodruff v. Fisher,* 17 Barb. (N. Y.) 224.

And in the same section, p. 918, it is said:

> And a statute can not require a landowner to maintain drains on his property for the purpose of carrying off water which accumulates on that of his neighbor. After a railroad or canal has been established and constructed, the legislature can not require its owner to maintain drainage ditches along the right of way for the benefit of adjoining owners. So the owner of an estate is not bound to maintain ditches which are on another's property, to carry the water from his own land. The same principle prevents one man from conferring a benefit upon the land of another without his consent, and then requiring him to pay for it.

In section 179, p. 951, it is said:

> As will be seen when we come to consider the rights of drainage as between individuals, one landowner has a right of way over his neighbor's land for a drainage ditch regardless of the necessities. And the government has no more authority in such a matter than the individual himself. It can not authorize the construction of a drainage ditch under the power of eminent domain over the land of a private citizen for the benefit of another citizen, nor can it authorize such right of way when it furthers private

interests only. As said in *Coster v. Tide Water Co.*, taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery. The fact that the prosperity of each individual conduces in a certain sense to the public welfare does not justify the taking of private property to increase the prosperity of individuals. And if the taking can not be upheld by the exercise of the rights of eminent domain it can not be so by referring the attempted exercise to the police power. So the power can not be exercised to permit a private corporation to drain land for the purpose of obtaining compensation which will result from doing the work. The mere fact that the statute permits the owner of wet land to reclaim it by draining over the land of his neighbor does not make the statute invalid, since it would be so construed as to require the public benefit to appear before it can be exercised. If the drainage is for the benefit of the public, the statute allowing it to be constructed over private property will not be rendered invalid by the fact that it will also result in private advantage.

In section 181, p. 956, it is said:

But when we turn to the case of drainage which will affect the property of only a single individual or of a few persons, we reach a different principle which has not always been perceived. In *Pool v. Trexler*, the court says: "If the general assembly has power to make regulations for draining a swamp containing 10,000 acres, it has the same power in regard to a swamp containing 1,000 acres; so of 100 acres or of 1 acre. There is no distinction in the principle; the only difference is in regard to the degree. Such drainage may be provided for under the police power. The two powers of eminent domain and police regulation are distinct. By the one, property of A is given to B. By the other, the property of A is left in him, but is made subservient to the general welfare. The power of the general assembly to make the land of A subservient to the land of B for the purpose of drainage must be yielded upon the authorities and upon the reason of the thing." But there is a difference in principle. If it is necessary to remove a nuisance from an acre of ground, it may be done under the police power. But the police power does not extend to giving A the right to drain his acre over the land of B merely because A's prosperity will thereby be enhanced. As said in *Re Theresa Drainage Dist.*, "A stat-

ute authorizing drains for agricultural, sanitary, or mining purposes, without requiring it to be necessary or desirable to promote any public interest, convenience, or welfare is not valid. The court says no doubt such an improvement may be useful to some, or perhaps many, private owners of land by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly or remotely in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. Some home or homes might be made more cheerful and healthful. But one man's property can not be taken to make another man's home more cheerful or healthful. It is only when it will make the homes of the public more healthful that any man's property can be taken for sanitary purposes."

In *Re Pequest River*, 41 N. J. Law, 175, Chief Justice Beasley, speaking for the court of errors, in respect to a state statute which he explained as designed to enable one set of landowners to compel another set to co-operate, against their will, to drain that body of meadow land in which they had separate interests, said:

> The persons thus coerced manifestly suffer an invasion of their ordinary proprietary rights. Why should they thus be forced either to improve their own land or help to improve the land of others? It can not reasonably be contended that this burden must be borne because the improvement is a public one. This was the view of the effect of this act expressed in the case of In re Drainage of Lands, 35 N. J. Law, 497; but, as such view was founded on the notion that a legislative requisition that private lands should be drained at the expense of their owners was an exercise of power similar in kind to a proceeding to condemn private property for the uses of a public road, I am compelled to think that decision rests upon a basis that is manifestly indefensible. I can see no rational ground for the assumption that the schemes to be executed by this act are, in the main, matters which, in any just sense, can be said to be of public concern. It is true that, under certain conditions, the reclamation of very extensive tracts of land which are subject to overflows by the tides, or which are otherwise submerged, may assume the importance of a public under-

taking. Such was the case presented in the litigation between *Tidewater Co. v. Coster,* 18 N. J. Eq. 519. Such would be the case if the condition of a tract of land was such as to be detrimental to the public health. But the law is not confined to such cases as these, for its scope embraces every case of a tract of meadows, no matter how small its area, which is distributed among as many as five separate owners. It is extremely plain, therefore, that the legislative purpose embodied in this act can not be vindicated on the plea that it directly conduces to the general welfare of the community. It does not seem open to question that it is the owners alone who are interested in the compulsory improvement of these lands. True, in such cases there is a resulting gain to the public, but this is nothing more than the inevitable incident of individual prosperity. The effect of drainage is to cause a more plentiful product than the land would yield in its unreclaimed condition. In this result the owner is directly interested, the community indirectly only, and it is a perversion of legal terms to call the enterprise, on account of such collateral advantage, a public one. So false is such a contention that, if yielded to, it would legalize the compulsory establishment of manufactories, or the converting of forests into arable land, or the execution of any private enterprise whatever, as in all such matters the state has a remote interest. To call the legislative fiat that a half dozen persons shall drain their land at their joint expense and for their private advantage an exercise of the taxing power of the state is, in my judgment, simply a misnomer. Nor is such an exercise of power any more justifiable, if it is to be derived merely from the nature of the legislative authority, than would be an enactment commanding A. and B. to farm their several lands at their joint expense; and yet no one will pretend that this can be done. Under a constitution that guarantees the inviolability of private property, and limits the lawmaking power to the function of legislation, it appears to me entirely inadmissible to claim that it is a legitimate use, of the prerogative to legislate, to enact a law such as the present one, requiring a few landowners to improve their lands for their own profit and at their own expense. I regard it as a clear in-

fringement of the constitution to take, by force of a statute, the money of a person from him, even though such money should, against his will, be used for his private benefit, in the improvement of his land. Such an act has nothing in common, with respect to legal principles, with the condemnation of property for the uses of the community, and to the charging, to a limited extent, of the costs of such improvement upon the landowners specially benefited. I can not assent to the hypothesis that this law can rest on the state's right to tax, or on its eminent domain.

In *Cole v. Dooley,* 100 N. W. (Mich.) 561, 562, in holding a drainage act void, the court said:

> The complainants own a mile and a half of the shore of the lake, with the riparian rights incident thereto, and they oppose the proposed drain, and have filed the bill in this cause to restrain its construction. The testimony shows that the interested landowners, who expect to have lands reclaimed by this drain, have contributed to a fund to conduct the defense; and it is significant that several, if not most, of the large contributors, own lands near the inlets, and are not owners of land through which the proposed drain is to be constructed. *It seems to be a plain case of tapping and drawing down the surface of a lake, and a barefaced proceeding to improve farms, at complainant's expense, under the pretense of improving the public health—a prostitution of the drain law to private purposes.*

In *Webb v. Lucas,* 147 N. W. (Minn.) 273, 274, it is said:

> The determination of the propriety or necessity of constructing a ditch, if it be for a public purpose, rests exclusively with the legislature, or with those to whom the legislature has given the power to make such determination, and a decision as to such matters made by the proper authorities can not be reviewed by the courts. *But private property can not be taken for ditch purposes unless the ditch will serve some public purpose. State ex rel. v. Board of Supervisors,* 102 Minn. 442, 114 N. W. 244, 120 Am. St. Rep. 640.

And these are cases having a direct bearing on this case: *Gilbert v. Foote,* cited in 5 Barb. (N. Y.) 474, 483; *Cypress*

*Pond Draining Company v. Hooper,* 2 Met. (Ky.) 350, et seq.; *Kean v. Driggs Drainage Company,* 45 N. J. Law, 91; *Commercial Bank of Cleveland v. City of Iola,* 9 Kan. 469, 2 Dillon 353; *In the Matter of Drainage Along Request River,* 12 Vroom, 175; *Request Drainage case,* 12 Vroom, 181; *Ryerson v. Brown,* 35 Mich. 333, 24 Am. Rep. 564.

Statutes which make private interest the test have been held void in the following cases: *Gaylord v. Sanitary District of Chicago,* 204 Ill. 576, 63 L. R. A. 582; *Savings & Loan Assn v. Topeka,* 20 Wall, 655-670, 22 L. ed. 455-463; *Parkersburg v. Brown,* 106 U. S. 487-504, 27 L. ed. 238-245; *Cole v. City of LaGrange,* 113 U. S. 1-9, 28 L. ed. 896-899; *Chicago B. & Q. R. R. Co. v. Chicago,* 166 U. S. 226-263, 41 L. ed. 979-994; *West River Bridge v. Dix et al,* 6 How. 507, 12 L. ed. 535-552; *Missouri Pacific Ry. Co. v. Nebraska ex rel Board of Transportation,* 164 U. S. 403-417, 41 L. ed. 489-495; *Kaukana Water Power Company v. Green Bay & Mississippi Canal Company,* 142 U. S. 254-282, 35 L. ed. 1004-1014; *Minneapolis General Electric Company v. City of Minneapolis,* 194 Fed. 215; *Shasta Power Company v. Walker,* 149 Fed. 568, 570, 572; *Walker v. Shasta Power Company,* 160 Fed. 856, 859, 860; *Osborne v. County of Adams* 106 U. S. 181-183, 27 L. ed. 129; *The Liberty Bell,* 23 Fed. 843; *Cleveland Electric Ry. Co. v. City of Cleveland,* 204 U. S. 116-142, 51 L. ed. 399-411; *Sutherland-Innes v. Village of Evart,* 86 Fed. 597-604, et seq.; *Parks v. Board of Commissioners of Wyandotte County,* 61 Fed. 436, 440; *St. Louis C. & R. Co. v. Thomas, et al,* 34 Fed. 774; *Weidenfeld v. Sugar Run R. Co.* 48 Fed. 615, et seq.; *Imperial Water Company No. 5 v. Holabird,* 197 Fed. 4, (Sec. 1, Art. 14 of the Constitution declaring the use of water to be a public purpose, p. 11); *City of Ottawa v. Carey,* 108 U. S. 110-124, 27 L. ed. 669; *Weismer v. Village of Douglas,* 64 N. Y. 91; *Matter of Jacobs,* 98 N. Y. 99, 111; *Williams v. Town of Duanesburgh,* 66 N. Y. 129, 144; *Inspiration Consolidated Copper Co. v. New Keystone Copper Co.,* 144 Pac. (Ariz.) 277; *Cozad v. Kenawha Hardwood Company,* 139 N. C. 283, 1 L. R. A. (N. S.) 969; *Miller v. Pulaski,* 69 S. E. 880, 22 L. R. A. (N. S.) 552; *Alfred Phosphate Company v. Duck*

*River Phosphate Company,* 113 S. W. 410, 22 L. R. A. (N. S.) 701; *Howard-Mills Company v. Schwartz Lumber & Coal Company,* 95 Pac. 559, 18 L. R. A. (N. S.) 356; *State of Washington ex rel Tacoma Industrial Company v. White River Power Company,* 82 Pac. 150, 2 L. R. A. (N. S.) 842; *Sutter County v. Nichols,* 93 Pac. 872, 15 L. R. A. (N. S.) 616; *Pere Marquette R. Co. v. United States Gypsum Co.,* 154 Mic.h, 290, 22 L. R. A. (N. S.) 181; *Kansas City v. Hyde,* 196 Mo. 498, 7 L. R. A. (N. S.) 639; *Arnsperger v. Crawford,* 70 L. R. A. 497; *Rockingham County Light & Power Company v. Hobbs,* 72 N. H. 531, 66 L. R. A. 581; *Clark v. Commissioners of Mitchell County, et al,* 66 L. R. A. 965; *Logan v. Stogdale,* 8 L. R. A. 58; *Welton v. Dickson,* 38 Neb. 767, 22 L. R. A. 496; *Board of Health of Portage Township v. Van Hoesen,* 14 L. R. A. 114; *Avery v. Vermont Electric Company,* 59 L. R. A. 817; *Pittsburg, Wheeling & Kentucky R. Co. v. Benwood Iron Works,* 2 L. R. A. 680; *St. Louis, Iron Mountain & Southern R. Co. v. Petty,* 20 L. R. A. 434; *Kyle v. Texas & New Orleans R. Co.* 4 L. R. A. 275; *Re Barre Water Company,* 9 L. R. A. 195; *Brewster v. J. & J. Rogers Company,* 169 N. Y. 73; *Wisconsin Water Company v. Winans,* 20 L. R. A. 662; *Re Opinion of Justices,* 204 Mass. 607, 27 L. R. A. (N. S.) 483; *Meitzel v. Spokane International Ry Co.,* 36 L. R. A. (N. S.) 522; *Salisbury Land & Improvement Co. v. Commonwealth of Massachusetts,* 215 Mass. 371; 46 L. R. A. (N. S.) 1196; *Sanborn v. Van Duyne,* 96 N. W. (Minn.) 41; *Pennsylvania Mutual Life Ins Co. v. City of Philadelphia,* 242 Pa. 47, 49 L. R. A. (N. S.) 1062; *State of Washington ex rel Springfield Investment Co. v. Superior Court of Skagit Co.,* 78 Wash. 679, 51 L. R. A. (N. S.) 987; *Anderson v. Smith-Powers Logging Co.,* 139 Pac. 736; *State ex rel Schropshiere v. Superior Court of Pacific Co.,* 99 Pac. 3; *Northern Light & Power Co. v. Stacher,* 109 Pac. 896; *State ex rel Clark v. Superior Court of Callam Co.,* 114 Pac. 444; *Bradley v. Pharr,* 19 L. R. A. 647; *The State v. Railway Company,* 40 Ohio St. 504; *State ex rel Luedinghaus v. Superior Court of Lewis* Co., 130 Pac. 752; *Jeter v. Vinton-Roanoke Water Co.,* 33 Am. & Eng. Ann. Cas. 1029; *Matter of Splitrock Cable R. Co.* 128

N. Y. 408; *Matter of Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Barton v. Riverside Water Co.*, 23 L. R. A. (N. S.) 331; *Garrison v. North Pasadena Land & Water Co.*, 124 Pac. 1009; *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 128 Pac. 924; *Matter of Niagara Falls & Whirlpool Ry. Co.* 121 N. Y. 319; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 36 L. R. A. 55; *Opinion of Justices*, 15 L. R. A. 809; *Bush v. Board of Supervisors of Orange Co.*, 159 N. Y. 212, 45 L. R. A. 556; *Baltimore & E. R. Company v. Spring*, 89 Md. 510; *Lucas County v. State*, 75 Ohio St. 114; *State ex rel Garth v. Switzler*, 40 L. R. A. 280; *Patty v. Colgan*, 18 L. R. A. 744; *Coates v. Campbell*, 35 N. W. (Minn.) 366; *Kingman v. City of Brockton*, 11 L. R. A. 123; *William Deering & Company v. Peterson*, 77 N. W. (Minn.) 568; *Deal v. Mississippi Co.*, 14 L. R. A. 622; *Atchison, Topeka & Santa Fe R. Co. v. Campbell*, 48 L. R. A. 251; *Oxnard Beet Sugar Co. v. State of Nebraska*, 73 Neb. 57, 66; *Michigan Sugar Company v. Dix*, 124 Mich. 674, 83 N. W. 625; 56 L. R. A. 329; *Minnesota Sugar Company v. Iverson*, 97 N. W. (Minn.) 454; *State v. Adams County*, 15 Neb. 568, 569; *Getchell v. Benton*, 30 Neb. 870; *Albright v. Sussex County Lake & Park Commission*, 71 N. J. Law 3, 2 Am. & Eng. Ann. Cas. 48, 49; *Bailey v. The Mayor etc. of the City of New York*, 3 Hill (N. Y.) 531; *Commissioners of Wyandotte County v. Abbott*, 52 Kan. 148; *Huber v. Merkel*, 94 N. W. (Wis) 354, to which might be added many other like cases.

**(4) A Statute Declaring a Corporation Essentially Private to be Public and a Purpose Essentially Private to be a Public Purpose, is Unconstitutional and Void.**

In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 669, 4 L. ed. 629, 667; *Briscoe et al v. The Bank of the Commonwealth of Kentucky*, 11 Pet. 258, 9 L. ed. 709, 735; *Piqua Branch of the State Bank of Ohio v. Knopp*, 16 How. 369, 14 L. ed. 977, 982, and *Rundal v. Delaware & R. Canal Company*, 1 Wall Jr., 275, 21 Fed. Cases, 12, 139, it is held is essentially a private corporation. *Bonaparte v. Camden &* that an organization like that to be created under this statute *A. R. Co., Baldwin* 205, 3 Fed. Cases, No. 1,617, p 820, 821.

That the legislature can not declare an organization essentially private to be public and, therefore, entitled to exercise the right of eminent domain, is demonstrated by the masterly opinion of Senator Tracy in *Bloodgood v. The Mohawk & Hudson River Railroad Company,* 18 Wend. 9, 52, et seq., in this language:

> It is, therfore, I think, to be construed in both cases as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken only for the public use, and then only upon a just compensation. It is not very certain that the constitution of the United States contemplates by this provision any other than a direct use by the government itself through its officers, and for the purposes of the government as a political being—as in cases of impressment for military service, or the taking of lands for forts, light-houses, dock-yards, etc.; and it may be doubted whether the national government has the power by virtue of sovereignty to take private property, without the consent of its owner, for the purpose of dedicating it to a popular public use, by which is meant a use by the people generally as individual beings, as for a common highway. If it be correct that the Constitution of the United States does not reach a case of a mere popular use, but is restricted in the meaning of public use to a use by the government as an organized political being, a question possibly might arise whether the same words transferred to the constitution of this state are to be restricted to the same meaning and whether the introduction of them into our constitution does not so far operate as a new limitation of the powers of the state functionaries as to make the legislative acts appropriating private property, passed previously to the new constitution, at best but questionable precedents for those that may be passed subsequently to its adoption. But admitting that the general welfare and even imperative public necessity require such a construction of legislative power as shall authorize the appropriation of private property, not only for the use of the state in its political character, as in case of canals or other public works, where the whole property remains in the state, but also for the use of the people distributively, or as individual mem-

bers or parts of the political community, as in case of highways, streets, squares, etc., we are then to inquire: 1. Whether the term "public use" is not in either case to be confined to its simple sense of direct possession, occupation and enjoyment by the public; and 2. Is not the power of taking private property for public use, in any event, such an attribute of sovereignty that it must be exercised directly by the sovereignty acting through public political agents, and cannot be delegated to individuals or corporations, not public political agents, to be by them exercised at their own discretion and for their own benefit?

When we depart from the natural import of the term "public use" and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. One man, unwisely, perhaps, prefers to suffer his lands to lie unoccupied, or his waterpower to remain unimproved, which another is anxious to convert to uses highly advantageous to the public. On what principle shall a law, transferring the title from the owner to his more enterprising neighbor, on the payment of a just compensation, be pronounced unconstitutional, if using property beneficially to the public, is to be deemed a public use of it? * * * This position it will be seen, disregards the distinction between a public use, and a public interest in a particular use of private property, and confers on the legislature the rights of determining, first, that the public interest will be promoted by the particular use of private property; and, next, because the public interest will be promoted by such use, that, therefore, it is a public use; and finally, it being a public use, it becomes a mere question of expediency with the legislature whether they shall authorize private property to be taken to subserve

it or not. It seems to me that such a construction of legislative powers is inconsistent with the secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision. Indeed, it concedes to legislative discretion a wider range than I think could be maintained for it on the principles of natural law, if we had no written constitution. * * * But it by no means follows, as seems to have been supposed, that the legislature can determine that a particular use is a public use of private property, within the meaning of the constitution. The nature of the use to which the legislature may dedicate the property of a citizen, is not established by the name which they give it, but is an inherent and inseparable quality or characteristic which cannot be changed, however, it be denominated. Much less are we to confound the notion of legislative discretion with that of sovereign power. * * * Conceding freely to the legislature the right of appropriating private property to the public use, but denying confidently to it the power of making that a public use which in its nature is not: the question recurs, whether the use by the defendants of the lands taken from the plaintiff for the purpose of constructing thereon a railroad, to be owned and possessed by them as a corporation, is that public use for which alone private property can be taken. * * * Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees? If an incidental benefit, resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of the constitution, it will be found very difficult to set limits to the power of appropriating private property. It is hardly necessary to illustrate by supposed cases the extent to which such a doctrine could be legitimately carried. A person anxious to establish a line of stages for the public accommodation, certainly might ask the interposition of the legislature to enable him to appropriate his neighbor's horses for the public use; and even in the present case, the legislature might have

authorized the corporation to take personal property such as horses, cars, etc., which was necessary for the maintenance of their railroad, on the same principle as that on which rests the authority to take the lands of the plaintiff. It is not sufficient to say that the legislature will exercise this power of appropriating private property with discretion, when the inquiry is, whether the security of the citizen rests in the discretion of the legislature, or in the guaranty of the constitution.

The circumstance that the privilege of making a railroad and taking tolls thereon is a franchise, seems to me to have less force in determining this question than has been attributed to it. All corporate privileges are franchises, and the use of them may be regulated or restricted by legislation as much as the franchise of railroad corporations. Banking corporations, insurance corporations and many others, are franchises, and the grant of them has been as distinctly on the ground of promoting the public interest as the grant of railroads. In every sense bearing on this question, license to keep a tavern is a franchise, and the obligation of the tavern-keeper to the public and to individuals is as defined and as extensive in its nature as that of a railroad company; and there is the additional analogy of the license being granted for public accommodation and benefit. But when we come to cases like these, the distinction between the taking of private property for public use, and the taking of it for individual use, beneficial to the public, becomes marked and obvious.

See to the same effect, *Arnsperger v. Crawford*, 70 L. R. A. 497, *et seq.; Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia*, 242 Pa. 47, 49 L. R. A. (N. S.) 1062, *et seq.*

"The legislature can not, by its mere fiat, make a private use of a public use." *In Re Schubert*, 114 N. W. (Minn.) 244, 245; *Brown v. Gerald*, 70 L. R. A. 472.

"A legislature can not make a private purpose public by declaring it to be such, or by authorizing the exercise of the power of eminent domain for any use which the courts may determine not to be a public use," *Webster v. Susquehanna Pole Line Company*, 112 Md. 416, 21 Am. & Eng. Ann. Cas. 357; *State v. Bancroft*, 134 N. W. (Wis.) 330, 339.

"A legislature can not make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative, function. *Allen v. Inhabitants of Jay,* 60 Me. 124, 139, 11 Am. Rep. 185; *Tyler v. Beacher,* 44 Vt. 648, 651, 8 Am. Rep. 398; *In re Eureka Basin Warehouse & Mfg. Co.,* 96 N. Y. 42, 47, 48." *Dodge v. Mission Township,* 107 Fed. 827, 829.

The declaration, therefore, of section 28 is in conflict with the language, policy and tenor of the entire act and possesses no force.

"It is imposible in the nature of things to form a private corporation without the consent of the corporators, and the legislature has not the power to create that consent." 1 Morawitz on Private Corporations (1886), section 24, p. 24; 2 Morawitz on Private Corporations. (1886) section 736. p. 704; Marshall on Corporations (1902), section 195, pp. 495-496; Elliott on Private Corporations (1911), section 15, p. 17, sections 24, 25, p. 25; *Ellis v. Marshall,* 2 Mass. 369, 3 Am. Dec. 49, 51; *Butler University v. Schoonover,* 114 Ind. 381, 5 Am. St. Rep., 627, 630.

"Nothing seems better settled at the common law than the doctrine that the crown can not force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporations. *Neither can the crown compel a man to become a member of such corporation against his will." Trustees of Dartmouth College v. Woodward,* 4 *Wheat.* 518, 707, 4 L. ed. 629, 676.

**(5) The Act is Void as it Affords the Owner Over Whose Land a Right of Way is to be Taken no Opportunity to Participate in the Selection of the Commissioners.**

From pages 96 to 108 of the plaintiffs' brief this point, with others, is presented. But in doing so the *State ex rel. Farmer v. Grand Island & W. C. R. Co.,* 31 Neb. 209, was overlooked, in which it is said, *arguendo,* that such notice is not made

necessary by the statute, from which it might be inferred that the court intended to so hold. That case is not applicable because it is well understood that a railroad company, being a quasi-public corporation, may, when authority is given by statute, condemn a right of way for its track and for other appropriate purposes, in which case the only remedy of the land owner is by appeal from the award of damages; but that rule does not apply here. There was some art in the adoption of section 12, which, by reference, incorporates the proceedings for the condemnation of a right of way for railroad purposes. By that means the land owner is prevented from contesting the legality of the act authorizing the creation of a drainage district, which is its purpose as manifest in sections 35 and 36. These and other sections are restrictive of the right of a land owner and attempt to place the validity of the organization beyond question by the ordinary and usual process of law.

With this explanation, I urge that the act is intentionally deficient in giving the owner of land over which it is sought to take a right of way any remedy, and that to constitute due process of law he is entitled to notice of the time and place of the appointment of the commissioners, and has a right to be present and object to any disqualified person proposed as a commissioner.

**(6) The Taking of Lot Five of Mr. O'Neill's Land Was in Violation of Due Process of Law.**

This question is fully presented, in the light of the authorities, from page 100 to page 104 of the plaintiffs' brief, and I do not care to add anything to what is there said.

## IV.

## THE STATE CAN NOT BY THE VIOLATION OF ITS OWN CONSTITUTION IMPART VITALITY TO THE ACT AND MAKE IT DUE PROCESS OF LAW.

This contention and the authorities supporting it, are found on page 104 to page 111 of the plaintiffs' brief. But in addition to what is there said, I have to observe that it is quite apparent that the construction given to the statute by the

Nebraska court, is not binding. Whether a legislative act of a state, or an ordinance, or regulation of any of its subdivisions, or a decision of any of its courts, violates the second clause of section 1 of the 14th amendment, presents a question to this court for its decision, regardless of the decision of the state court,—that is, the final decision rests with this tribunal. The decision of a state court can be examined and if its reasoning is found persuasive, adopted; but if it avoids, or seeks to avoid the question, or if its reasoning is unsound, it is not even persuasive and is to be disregarded. Such seems to be the view of the court in *Olcott v. Supervisors of Fond Du Lac County,* 16 Wall. 678, 698, 21 L. ed. 382, 386, where it is said:

> Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. R. R. Co.*, furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.

## V.

## A DE FACTO CORPORATION CAN NOT EXERCISE THE RIGHT OF EMINENT DOMAIN.

This rule is fully settled by the authorities cited on page 111 to page 113 of the plaintiff's brief, and I do not care to add anything to what is there said.

## VI.

## THE CASE PRESENTS A DIRECT ATTACK ON THE CONSTITUTIONALITY OF THE ACT HERE DRAWN IN QUESTION.

This proposition is fully presented on pages 113 to 117 of plaintiffs' brief, but the authorities cited are not as apt or pertinent as the following:

If the act is unconstitutional and void, the attempted entry upon the plaintiffs' land to take a right of way will be enjoined. *Welton v. Dickson,* 38 Neb. 767; *Watson's Executor v. The Trustees of Pleasant Township,* 21 Ohio St. 667; *Sterritt v. Young,* 14 Wyo. 164, 4 L. R. A. (N. S.) 169; *State ex rel Wausau Street Ry. Co. v. Bancroft,* 134 N. W. 330, 38 L. R. A. (N. S.) 526; *Groff v. Bird in Hand Turnpike Co.,* 5 L. R. A. 661; *Huber v. Martin,* 105 N. W. (Wis.) 1031, 3 L. R. A. (N. S.) 653, 655; *Bradley v. Fallbrook Irrigation District,* 68 Fed. 648; 2 Lewis on Eminent Domain (1909) sec. 901, pp. 1568, 1572, et. seq. and notes; *Matter of Niagara Falls & Whirlpool Ry. Co.,* 121 N. Y. 319; *Brown v. Gerald,* 70 L. R. A. 472; *Carbon Coal and Mining Co. v. Drake,* 26 Kan. 345. And the right of attack is preserved to those who are "directly affected thereby." (Sec. 35)

Whether the attack is direct or collateral pertains merely to the remedy and the opinion of the state court is not binding. As the plaintiffs' lands are not in the proposed district, they could not be parties to the court proceeding to organize it and, therefore, could not appeal from the decree establishing it. The only remedy the statute affords them is "the right to appeal from such *assessment of damages*" (Plaintiffs' brief, p. 114; sec. 97, chap. 16, Compiled Statutes 1909, pp. 580, 581; Revised Statutes 1913, sec. 5946, pp. 1645, 1646). They can not test the validity of the statute by *quo warranto* as they were not interested in the organization and the remedy belongs to the state, nor by *certiorari* for the same reason. It was only when the defendants attempted to condemn and take a right of way over their lands that the plaintiffs were clothed with the right to attack its validity, and their only remedy is injunction. An attempt to deprive them of an adequate remedy would, of course, be invalid.

## VII.

## A REVIEW OF SOME OF THE DECISIONS RELIED UPON BY THE DEFENDANTS.

*Wilson v. Black Bird Creek Marsh Company,* 2 Pet. 245-252, 7 L. ed. 412; *Davidson v. Board of Administrators of New*

*Orleans,* 96 U. S. 97, 108, 24 L. ed. 616-620; *Hagar v. Reclamation District No. 108,* 111 U. S. 701-715, 28 L. ed. 569; *Head v. Amoskeag Manf. Co.,* 113 U. S. 9-26, 28 L. ed. 889; *Wurts v. Hoagland,* 114 U. S. 609-612, 29 L. ed. 229; *Mugler v. Kansas,* 123 U. S. 623, 31 L. ed. 205; *Sweet v. Rechel,* 159 U. S. 380, 40 L. ed. 188; *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112-173, 41 L. ed. 369, 390; *Clark v. Nash,* 198 U. S. 361-370, 49 L. ed. 1085; *Chicago, Burlington & Quincy Ry Co. v. Illinois,* 200 U. S. 561, 586, 50 L. ed. 596, and *Strickley v. Highland Boy Gold Min. Co.,* 200 U. S. 527, 50 L. ed. 581, 583, are relied on by defendants to sustain their contention that the organization authorized by the statute has for its object the accomplishment of a public purpose and is, therefore, properly clothed with the right of eminent domain.

The *Wilson case* was trespass *vi et armis* to recover damages for a steam boat breaking through a bridge over, and destroying a dam in, a navigable creek and an arm of the sea. The company owned and possesed marsh and low lands along a navigable creek and was authorized by an act of the Delaware legislature, "to construct a good and sufficient dam across said creek at such place as the managers, or a majority of them, shall find to be most suitable for the purpose; and also to bank the said marsh, cripple and low ground, etc." Pursuant thereto the company placed a dam in the creek by which navigation was obstructed and Wilson and his associates, who were the owners of a sloop enrolled and licensed under the laws of the United States, "broke and injured the dam so constructed by the company" and the action followed. The defendants pleaded that the stream was a highway open to navigation by boats, etc., and that they removed the obstruction, doing no more damage than was necessary to accomplish that end. The plaintiffs demurred to the plea and judgment being entered thereon the decision was affirmed by the Delaware court and the case was remanded for further proceedings. A final judgment being entered on the verdict the case was again taken to the Delaware court, where the judgment was affirmed and then brought to this court for review.

The opinion is by Chief Justice Marshall who, in speaking of the legislative act, said:

> The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, *and the health of the inhabitants probably improved.* Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The opinion deals with an alleged conflict between the act and the commerce clause of the constitution:

> We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce *in its dormant state,* or as being in conflict with any law passed on the subject.

That case was decided in 1829, when the 14th amendment was not contemplated. The contention of Wilson and his associates was ruled adversely on the theory then prevalent that a state could regulate commerce until by act of congress the general government should see fit to do so.

In the *Davidson case,* decided in 1878, the city of New Orleans and the administrators thereof, political sub-divisions and agencies of the state, filed a petition in a local court alleging an assessment under a Louisiana statute for draining swamp lands within the parishes of Carroll and New Orleans and asking that such assessment be homologated by the judgment of the court. Davidson resisted the application and it was refused, but on appeal the judgment of the court was

reversed and the case being remanded, the assessment was approved and homologated. The case reached this court and the decision is based exclusively upon the thought that the statute was to promote the public health and, therefore, to serve a public purpose.

Thus it is said:

> That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the *public use*, whether it be of the whole state or of some more limited portion of the community, * * * the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

The difference between a statute intended to promote sanitary conditions and one the purpose of which is to transfer the property of A to B is clearly stated.

The *Hagar case* was decided in 1884, and involved the construction of a California statute which provided for the creation of irrigation districts to be established by the board of supervisors of the county in which the lands, or a greater part of them, were situated, upon the petition of *one-half or more of the holders thereof*. The petitioners were required to adopt by-laws for the work of reclamation, to elect three of their number as a board of trustees to manage the affairs of the district, were empowered to employ engineers and others to survey, plan and estimate the cost of the work, and of the lands needed for a right of way, locate drains, canals, etc., and to construct, maintain and keep in repair all works necessary for the objects in view. The trustees were required to report to the county board of supervisors, and in a word, everything was to be done under the strict supervision and control of the county board. It was held that the act was a sanitary measure and not in violation of the 14th amendment.

The *Head case* was decided in 1885 and upholds a New Hampshire act authorizing any person to erect a water mill and mill-dam upon his own land on a navigable stream, paying

the owners of the land flooded thereby, and held that it did not deprive the latter of their property without due process of law. The case was based upon the thought "that a grist mill which grinds for all comers, *at tolls fixed by law, is for a public use.*" Respecting the question whether such an act would be valid if it authorized a condemnation for the purpose of erecting manufacturing mills or plants, this language is used:

> The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.

In the *Wurts case,* decided in 1885, the constitutionality of a New Jersey statute was considered and it was said that:

> The case comes within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Manf. Co.,* 113 U. S. 9, 28 L. ed. 889.

The New Jersey court, however, is in hostility to the *Wurts case. Kean v. Driggs Drainage Company,* 45 N. J. Law. 91, 95. And it is criticised in 1 Hare's American Constitutional Law (1889) p. 291.

In the *Wurts case* a statute delegated to the board of managers of the geological survey, a political branch or agency of the state, authority "to examine the tract, and, if they deem it for the interest of the public and of the landowners to be affected thereby," to make surveys, adopt a system of drainage and report the fact to the court, in which event the latter is authorized "to appoint three commissioners to super-

intend and carry out the system of drainage so adopted and reported." If "at the time fixed for such appointment of commissioners, it shall appear to the court by the written remonstrance of the owners of a majority of the said low and wet lands, duly authenticated by affidavit, that they are opposed to the drainage thereof at the common expense, then the said court shall not appoint such commissioners." And, of course, the case is at an end. The statute in that case makes it discretionary with the board of managers of the geological survey to entertain or to act upon the application. If they refuse to act, that ended the matter. And it was mandatory upon the court to refuse its order if a majority of the landowners were opposed to drainage at the common expense.

This case radically differs from the *Wurts case*. Here, under the statute, when the articles of association are signed and, together with a petition filed in court by "a majority in interest," the court is compelled to grant the prayer of the petition and establish the district regardless of any protest on the part of dissenting landowners. The favorable action and recommendation of no intermediate state agency is required as a preliminary step; and the landowner who is brought in by judicial process over his protest, must assume the burden of proof and establish to the satisfaction of the court,—which may be capricious or whimsical,—that his land will not be benefited by the organization of the district, before he can hope to escape.

The *Head case* is criticised by Mr. Lewis in a note to sec. 279, 1 Lewis on Eminent Domain, p. 554, in which he says that it is in conflict with *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 20 L. ed. 557, and *Cole v. LaGrange*, 113 U. S. 1-9, 28 L. ed. 896. And finally he says: "The only reconciliation that can be made of these cases is to limit the opinion in *Head v. Amoskeag Manf. Co.* to the particular point decided, viz: that the mill acts of New Hampshire were due process of law in that state at the time the Fourteenth Amendment was adopted."

The *Mugler case*, decided in 1887, involved the validity of a prohibitory statute of Kansas and has no bearing on the case at bar, save as it holds that the police power of the state is subordinate to the federal constitution.

The *Sweet case* determined the validity of a Massachusetts statute, entitled "An act to enable the city of Boston to abate a nuisance therein and for the preservation of the public health in said city," and held it valid as a sanitary measure and therefore for a public purpose.

The *Fallbrook case*, decided in 1896, is instructive. The constitutionality of a California irrigation statute was involved. It appears that in 1890 between Colorado and the Pacific ocean there were six hundred million acres of arid or desert land, practically no part of which could be inhabitated, cultivated, or rendered habitable unless irrigated. The case is lengthy and rests upon this language:

> *To provide for the irrigation of lands in states where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme.* On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power.

In a measure, the decision also rests upon a provision of the California constitution that "the use of all water apportioned, or that may hereafter be apportioned, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be prescribed by law." Of course, if it were in conflict with the 14th amendment it would give way because of article

6 of the federal constitution, in which it is said that: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." For the reasons stated, however, the act was held valid. But the California court must have understood that it was not to be regarded as authority for upholding a statute authorizing the creation of a drainage ditch for private purposes as that court in 1899 decided such a statute unconstitutional. *Nickey v. Stearns Ranchos Co.*, 58 Pac. 459.

The *Clark case*, decided in 1905, upholds a Utah statute authorizing one person to condemn a right of way to flow water through the ditch of another for the purpose of irrigation as constituting a public use. It is said:

> But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained.

The almost universal desert character of the land in Utah, and the overmastering necessity for subjecting it to cultivation by irrigation, seemed to be the basis of the *Clark case*.

The *Chicago, Burlington & Quincy Railroad case*, decided in 1906, construed a statute entitled "An act providing for drainage for agricultural and sanitary purposes, etc.," by which certain public officers were made drainage commissioners with authority "to make all necessary bridges and culverts along

or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, *or by the railroad company,* as the case may be," and it was held that an order made pursuant thereto was binding and that the statute was valid. In this connection it must be remembered that Illinois has a constitutional provision for the organization of private drainage districts. The case is in keeping with the universally recognized rule that a railroad company may be required to put in a highway or street crossing, or to lower or raise its track at its own expense to suit the public necessity and to promote the public safety.

The *Strickley case,* decided in 1905, involved the validity of a Utah statute that: "The right of eminent domain may be exercised in behalf of the following public uses: • • • (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines." In upholding the act and in speaking of *Clark v. Nash* Mr. Justice Holmes uses this significant language:

> While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent.

The distinction between these cases and the instant case is plain. In the instant case useless water is to be diverted that the lands of the defendants and their associates may be made more productive for strictly private agricultural purposes and therefore more valuable. In the cited cases water, the conservation and distribution of which is necessary for public purposes and confessedly the subject of lawful regulation, is to be used to irrigate and fertilize almost a third of the continent and make it habitable and productive, or to set the wheels of toll-paying mills in operation for public use.

## VIII.

## THE ACT IS VOID AND THE JUDGMENT OF THE SUPREME COURT OF NEBRASKA OUGHT TO BE REVERSED.

It is not claimed that the lands sought to be embraced in the proposed district are swamp lands in the sense that they are usually under water, but only that they are occasionally overflowed owing to the fact that the declination of Elk creek after it leaves the hills northwest of Jackson and flows over the valley to a union with Omaha creek and thence to the Missouri river, is but from a foot to a foot and a half per mile. In the course of time the water passes away. The defendants seem to think (their brief p. 47) as the proposed district is to embrace 7,000 acres that that fact is an argument in favor of upholding the constitutionality of the act. But in *Cypress Pond Draining Co. v. Hooper, et al,* 2 Met. (Ky.) 350, 351, the ditch embraced 14,621 acres, but that did not save the statute under which it was organized,—very similar to the one in question,—from condemnation.

No bonds of the proposed district have been registered, or sold and it has no outstanding obligations. Bonds can not be put upon the market or sold until registered in the office of the auditor of public accounts (sec. 20) and until after ten days' notice has been given of the time and place of sale (sec. 22). There are no intervening rights of third persons to cause any hesitancy in applying the constitution to this statute.

These rules seem to be elementary: A statute having a double purpose, one which is public and the other private, is void as to the latter; a statute granting a power which may be used for a public or a private purpose at the option of the grantee, is void. *The Attorney General v. City of Eau Claire, et al,* 37 Wis. 400, 437. If a granted power is in its nature essentially private, its private purpose can not be veiled or hidden by a declaration that it has a public purpose. If in its essence the object of a statute is public and its incident is private, it is valid; but if in its essence it is private

and its incident is public, it can not be upheld. Whether the purpose is a public or private one is to be ascertained by the process of judicial inclusion and exclusion, which, applied to the act in question, I do not doubt will cause it to fall under the condemnation of the 14th amendment.

This case is much like *Scuffletown Fence Co. v. McAllister*, 12 Bush (Ky.) 312, of which Mr. Lewis says, in section 312 of 1 Lewis Eminent Domain (3 ed.) p. 589: "The legislature of Kentucky passed an act creating a corporation with power to fence a tract of some fifteen hundred acres of land which was subject to annual floods carrying off the fences. The cost was to be made a tax upon the several owners, according to acreage. The law was held invalid as not being for a public purpose." And *Matter of Eureka Basin Warehouse and Manufacturing Co.*, 96 N. Y. 42, 45, where an act authorizing the condemnation of swamp and marsh land and the erection and maintenance of "basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries, shops, and such other buildings as might be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for carrying on generally the business of a dock, warehousing and manufacturing company" was held void as being for a private purpose.

There was not the slightest necessity for the enactment of this statute, as I have shown there were and are other statutes in force under which a drainage corporation could be organized. A careful reading and a close analysis discloses a studied and fixed purpose on the part of the author to evade the provisions of the constitution and to authorize the taking of private property for a private use. I ask what is to be done with the water that is to be diverted from these lands? Is it to be used for necessary domestic purposes? Is it to supply a city or village with water for the consumption of its inhabitants, or to turn the wheels of mills, or to add to the depth of a channel through which commerce is to be floated? Nothing of the kind was or is contemplated. It is to be wasted,—thrown into Jackson lake,—to mingle with

other useless water and flow away. What public use will the land from which the water is to be diverted be put to? Are highways, railroads, canals, or other means of public travel to be located on them? Is a municipality to be built upon them? Will the public have any greater interest in them than it had before the organization of the so-called district? Will one landowner have an interest in the land of the others? Are the lands to be held in common? If I should go upon any of them without the owner's consent, would I not be subject to an action of trespass? What public use or purpose will they be appropriated to? I submit these questions to be answered by learned counsel, but in advance I urge that they have no conceivable public use or purpose to serve. They are simply to be enhanced in value to the owners by being made more productive of cereals and grasses, or capable of more profitable cultivation, the proceeds of which are to pass into the pockets of the owners and no part to be given to the public. Will the public have any interest in or right to enter upon the lands regardless of the will of the owners? That the organization to be created under this statute has for its sole object a strictly private purpose there can be no doubt; and to that end adjoining owners are, contrary to their wishes, prevented from having a voice in its establishment.

Dissenting landowners are rendered incapable of making a protest or of uttering a syllable against the enterprise. That, too, renders the act void. *Ferbrache v. Drainage District No. 5*, 44 L. R. A. (N. S.) 538, 543.

Men who buy overflowed lands do so with their eyes open and at overflowed land prices, and have no legal or moral right to ask others to aid them to enhance the value of their estates. If the land of a resident owner can be forced into this organization and his title clouded by taxes and assessments for its benefit and his property rendered unsaleable it will be taken for a private purpose and therefore without due process of law. Such a landowner can not sell his property to advantage, or make a loan on it not only because of

the burdensome assessments and taxes, but because of additional assessments and taxes that may be made from time to time in the discretion of the board of supervisors.

The beautiful and highly cultivated estates of the plaintiffs, which they have owned for more than a quarter of a century,—from early manhood to old age,—ought not to be ruined by the construction of a ditch thereon, which, together with the dirt thrown from it will cover 200 feet wide diagonally across the entire tracts. And particularly when the defendants and their associates can, under other laws of the state, accomplish the drainage of their lands, if desired, at their own expense.

I submit, therefore, that the act is void and that the judgment of the supreme court of Nebraska ought to be reversed.

Respectfully submitted,

WILLIAM V. ALLEN,
*Attorney for Plaintiffs in Error.*

M. D. TYLER, *Norfolk, Nebraska,*
*Of Counsel.*

(23955)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1915.

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HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR.

*vs.*

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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## BRIEF OF DEFENDANTS IN ERROR.

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# IN THE SUPREME COURT OF THE UNITED STATES.

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN,
*Plaintiffs in Error,*
*vs.*
JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL,
*Defendants in Error.*

28955
OCTOBER TERM, 1915.

## STATEMENT OF THE CASE.

This action was submitted to this court on defendants' motion to dismiss and affirm under the rule. The motion was overruled. Since the ruling on the motion the plaintiffs have served and filed in this court a "Supplemental Brief," which will hereinafter be termed the "Supplement" to distinguish it from the brief first filed by the plaintiffs, which, for convenience, we will call the "Plaintiffs' Brief."

## ISSUES.

The plaintiffs-in-error, hereafter termed the plaintiffs, commenced this action against the defendants-in-error, hereinafter termed the defendants, in the district court of Dakota County, Nebraska, on the 16th day of January, 1911. Under the laws of Nebraska, as they then were, the plaintiffs, on an *ex parte* hearing, obtained a temporary order of injunction, enjoining the defendants from entering upon certain real estate described in the petition. The petition is set forth in the Printed Transcript of the Record, hereinafter termed "Printed Transcript," on pages 1-8, the answer on pages 8-14, and the reply on pages 14-16. The petition

and reply are substantially set forth in the plaintiffs' brief. In the answer the defendants admit citizenship of the plaintiffs and the ownership of the land as alleged in the petition except as to Lot 4 or the Southeast Quarter of the Southeast Quarter of Section 29, and deny that the land is of the value alleged. The defendants admit that Jackson is incorporated and situated as alleged in the second paragraph of the petition, and the general character of Elk Creek and the adjacent hills, but deny that the channel of Elk Creek ceases at the village of Jackson and allege that it has a natural channel south of Jackson, which is supplemented and continued by an artificial channel to its junction with Omaha Creek in or near Section 2, Township 27, Range 8, in said county. The defendants admit that the lands south and east of Jackson are flat and that floods do not flow off rapidly and these lands, in extent about 7,000 acres, become swampy and marshy as alleged in the petition. The defendants admit the lands of the plaintiffs lie to the northeast of Jackson and that in recent years have not been flooded. The defendants admit that on September 4, 1905, they with others filed in the office of the clerk of the district court of Dakota County a petition and Articles of Association for the purpose of securing an order of said court organizing a drainage district which was called and is known as Drainage District No. 2 of Dakota County, Nebraska; that said petition and articles were prepared and filed and the order secured under the laws of the State of Nebraska as set forth in Sections 5561 to 5597, both inclusive, of Cobbey's Annotated Statutes (Ed. 1909), and that the same is Chap. 161 of the Laws of 1905 with the amendments thereto. The defendants deny that it was an ex parte order that declared said body a corporation, but that it was after service of process of the court, and upon a hearing had in open court upon evidence and upon which there was a finding by the court that it was a work of public utility and that the public health, convenience and welfare would be promoted thereby; that in pursuance of law and within twenty days after the order creating said corporation, these defendants submitted to the Secretary of State a certified

copy of the record relating thereto, which was filed in the office of the Secretary of State and recorded therein. The defendants urge that this is not a proper action in which to raise the question of the legality of the organization of this corporation, nor can it so be raised. The defendants admit that no part of plaintiffs' land is within the boundaries of the drainage district; that the defendants are residents, citizens and taxpayers of Dakota County, Nebraska; that they claim to be and constitute the Board of Supervisors of Drainage District No. 2 of Dakota County, Nebraska, and allege they and each of them are the duly elected, qualified and acting supervisors of said Drainage District No. 2; that said Drainage District has been fully, lawfully and regularly created and organized and made a public corporation and body politic of the State of Nebraska. The defendants deny that they claim to have a present right and authority to enter upon the lands of the plaintiff and make and construct any ditch or canal, but after they shall have paid to the County Judge of Dakota County, Nebraska, for the benefit of the plaintiffs, the sums fixed by the appraisers of the right of way, as hereinafter set out, they will have the right to enter and construct the ditch upon said lands (describing the dimensions and extent thereof). The defendants admit they have advertised and let contracts and that they intend to construct such an improvement, but deny that Jackson Lake has no outlet. All other allegations of the petition are denied. Special denials are made as to paragraphs 9 to 16 inclusive.

## TRIAL AND DECREE.

The case on the 24th to the 26th day of April, 1911, was submitted to the trial court, on a motion to dissolve the temporary injunction, and, by agreement of the parties, it was at the same time submitted generally, on the same evidence. On the 12th day of February, 1912, the motion to dissolve the temporary injunction was sustained, and findings, general and special, were made by the court, all of which were in favor of the defendants except as to Elizabeth Leahey, and a decree dissolving the injunction and dismissing the case

was entered. (Pr. Tr. pp. 18-22). (During the trial the defendants had disclaimed any right to enter upon the land of Elizabeth Leahey until that right had been acquired either by contract or by condemnation proceedings). (See Pr. Tr. of Rec., p. 105). The plaintiffs appealed to the Supreme Court of the state, where the case was presented, and on the 17th day of May, 1913, the Supreme Court of Nebraska affirmed the judgment of the trial court. The plaintiffs are now presenting the case in this court.

## STATUTE UNDER WHICH THE CORPORATION WAS ORGANIZED.

The sections of the statutes of Nebraska which are material to this investigation are correctly set forth on pages 3 to 24 inclusive of the defendants' brief in support of the "motion to dismiss and affirm."

This drainage statute is attempted to be set forth as Exhibit "A" to plaintiffs' brief. It is not correctly quoted there. All or nearly all of the amendments to the law made by the legislature of 1907 are omitted. It is believed by the defendants that none of these inaccuracies are material in or to the present controversy.

In the "supplement" the plaintiffs have republished a portion of the act with some of the same errors retained. That there may be no question, the defendants will present in this brief the entire drainage law under consideration as the law stood in 1909. In the portion of the act printed in the brief in support of the "motion to dismiss and affirm," defendants numbered the sections as in the Compiled Statutes of Nebraska, giving the history of the section quoted and the numbering of the same sections used in Cobbey's Annotated Statutes (Ed. 1909) and in the Revised Statutes of Nebraska (Ed. 1913). In this brief the defendants will use the numbering of the sections in Cobbey's Annotated Statutes and will give in parenthesis the numbering of the sections used in the Compiled Statutes and in the Revised Statutes.

Unless otherwise stated, statutes quoted, from either Cobbey's Annotated Statutes or the Compiled Statutes, in both

the brief in support of the "motion to dismiss and affirm" and in this brief are taken from the editions of 1909. When compared with the Revised Statutes (Ed. 1913), there will be found some differences because of amendments made in 1911 and 1913 and because of the subdivision of certain sections into two or more sections. The Peabody Drainage Act, as amended prior to August, 1909, and under which Drainage District No. 2 of Dakota County, Nebraska, was organized, is as follows:

Sec. 5561. (Laws 1905, Chap. 161, Sec. 1, Comp., Sec. 6239, Revised Stat. Sec. 1797.) DRAINAGE DISTRICT—ARTICLES OF ASSOCIATION—CONTENTS.

A majority in interest of the *owners in any contiguous body or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than one hundred and sixty acres, the names and place of residence of the owners of the land in said district, and the description of the several tracts or parcels of land in said district owned by those who may organize said district, and also the name or names and the description of the real estate owned by such as do not join in the organization of said district, but who will be benefited thereby, and such owners of real estate as are unknown may be set out in such articles as such, and said articles shall further state that the owners of real estate so forming said district for said purpose are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drain-

*Resident taken out in 1909 by amendment.

age of the said lands so formed into a district, as provided by law, and after said articles of association shall be signed, the same shall be filed in the office of the clerk of the district court of the county in which such drainage district is located, or, if such drainage district is composed of tracts or parcels of lands in two or more different counties, then in the office of the clerk of the district court of the county in which the greater portion of said proposed drainage district may be situated, praying that they may be declared a drainage district under this article.

Sec. 5562. (Laws 1905, Chap. 161, Sec. 2, Comp. Sec. 6240, Revised Stat. 1798.) SERVICE OF PROCESS.

Immediately after such articles of association shall have been filed, the clerk of the district court of the county in which the proposed district is located, and in case the drainage district be composed of territory situated in different counties, the clerk of the district court of the county in which the greater portion of the land and of the proposed district shall be situated, shall issue a summons, as now provided by law, returnable at the next term of the district court directed to the several owners of real estate in said proposed district who may be averred to be benefited thereby, but have not signed said articles of association, which shall be served as summons in civil cases, and in case any owner or owners of real estate in said proposed district are unknown, or are non-residents, they shall be notified in the same manner as non-resident defendants are now by law notified in actions in the district courts of this state, setting forth in said notice that the articles of association, as aforesaid, have been filed, and the purpose thereof, and that the real estate of such owner or owners situated in said district, fully describing the same, will be affected thereby, and rendered liable to taxation, or assessment, for the purposes of draining said district, and that application will be made to have said district declared a drainage district for the purpose of draining and reclaiming the same.

Sec. 5563. (Laws of 1905, Chap. 161, Sec. 3, Comp. 6241,

Revised Stat. 1799.) OBJECTIONS—HEARING—JUDGMENT.

All owners of real estate in said district who have not signed said articles of association and who may object to the organization of said drainage district, after having been duly summoned shall, on or before the second day of the term of Court to which they have been summoned to appear, file their objection, or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in said drainage district, and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and in case such objections are overruled, the district court shall, by its order duly entered of record, duly declare said drainage district a public corporation of this state. The fact that said district shall contain 160 acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements; and shall be sufficient grounds for declaring said organization a public corporation of this state. And in case any owner of said real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in said district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for.

Sec. 5564. (Laws 1905, Chap. 161, Sec. 4, Comp. Sec. 6242, Revised Stat. 1800.) FILING ARTICLES.

Within twenty days after the said district has been declared a corporation by the court the clerk thereof shall transmit to the Secretary of State a certified copy of the record relating thereto, and the same shall be filed in his office in the same manner as articles of incorporation are now required to be filed under the general law concerning corporations. A copy of said record, together with a plat of the district shall also be filed in the office of the county clerk of the

county, or counties, in which said district, or any part thereof, is situated.

Sec. 5565. (Laws 1905, Chap. 161, Sec. 5, Comp. 6243, Revised Stat. 1801.) BOARD OF SUPERVISORS—REPRESENTATION.

Within thirty days after the said district court shall have declared any drainage district organized, the clerk of said court shall upon fifteen days' notice, call a meeting of the owners of said real estate situate in said district at a day and hour specified, in some public place in the county in which said district was organized for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district and a majority of whom shall be resident of the county, or counties, in which such district is situated; the land owners, when assembled, shall organize by the election of a chairman and secretary of the meeting, who shall conduct the election; and at such election each and every acre of land shall represent one share, and each owner shall be entitled to one vote for every acre of land owned by him in such district, and the five persons receiving the highest number of votes shall be declared elected as supervisors; and they shall immediately by lot determine their terms of office, which shall be respectively one, two, three, four and five years, and until their successors are elected and qualified.

Sec. 5566. (Laws 1905, Chap. 161, Sec. 6, Comp. Sec. 6244, Revised Stat. Sec. 1802.) ELECTIONS—TERM OF OFFICE.

Every year after the election of the first board of supervisors, at such time and place in the county in which said district was organized as the board of supervisors may designate, and upon not less than fifteen days' notice, unless waived in writing, which notice may be given by personal service or by the publication of such notice for two weeks in a newspaper in each county in said district and of general circulation therein, which notice shall be sufficient if it notifies the land owners of said district without naming them individually, of the time, place and purpose of said meeting; and the secretary of said

board shall mail to the last known post office address of each owner, of land in said district, a copy of said published notice, such owners shall meet and elect one supervisor therefor in like manner as in the preceding section, who shall hold his office for five years and until his successor is elected and qualified; and in case of a vacancy in any office of supervisors, the remaining supervisors may fill such vacancy until the next annual election when a successor shall be elected for the unexpired term. (Amended in 1907.)

Sec. 5567. (Laws 1905, Chap. 161, Sec. 7, Comp. Sec. 6245, Revised Stat. Sec. 1803.) OATH OF OFFICE.

Each supervisor, before entering upon his official duties as such, shall take and subscribe an oath before some officer authorized by law to administer oaths, that he will honestly, faithfully, and impartially demean himself in office as supervisor of the various districts in which he was elected and that he will not neglect any of the duties imposed upon him by law.

Sec. 5568. (Laws 1905, Chap. 161, Sec. 8, Comp. Sec. 6248, Revised Stat. Sec. 1804.) OFFICERS—REPORT—COMPENSATION.

The Board of Supervisors shall, immediately after their election, choose one of their number chairman, and another secretary. Said board may adopt a seal, with a suitable device, and shall keep a record of all its proceedings, open to the inspection of all owners of real estate in the drainage district. At each annual meeting the board shall make a report of what work has been done, and shall annually publish a statement of its receipts and expenditures, in a legal newspaper printed, published and of general circulation in the county in which said district was organized. Such board of supervisors shall receive $2.00 per day compensation for time actually employed in the business of said district, not exceeding eighty ($80.00) dollars each per year, but reasonable allowance shall be made for necessary clerical work, and assistance, and the secretary shall receive for his services such compensation as the board of supervisors may agree

upon, payable out of the district drainage fund. The board of supervisors may employ an attorney to act for the district and to advise said board. (Amended in 1909.)

Sec. 5569. (Laws 1905, Chap. 161, Sec. 9, Comp. Sec. 6247, Revised Stat. Secs. 1805-1813.) SURVEY—PLAT—ESTIMATE—REPORT.

The board of Supervisors of any drainage district organized as aforesaid shall cause a topographical survey to be made of the district by some competent engineer. The said engineer shall make a complete topographical survey of the said district and submit the same to the board of supervisors with maps and profiles of said survey and a full and complete plan for draining, reclaiming, and protecting the lands in said district from the overflow of or damage by water, or floods; and also the physical characteristics and location of any right of way, road bed, bridge or bridges and other property or improvements in said district belonging to or under the control of any railroad company; and shall also report the location of any and all public highways, which may be crossed by the right of way of any ditch, levy or other improvement planned for said district. The said engineer shall also make an estimate of the cost of the entire drainage works and improvements required in said district to protect and reclaim said lands and property, showing the several items of the same. The said engineer shall go over and inspect and examine the lands in said districts, the railroad rights of way, road beds, bridges, culverts, depot grounds, grades, and all other railroad, telephone and telegraph property in said district; and shall also inspect and examine all other improvements, streets, highways and bridges belonging to any county, municipal or other corporation and which may be affected by the proposed drainage and reclamation works and improvements, and shall also examine the streams, water courses, ditches, ponds, lakes, and bayous within the district, or which may be partly within and partly without said district. He shall assess, as hereinafter directed and according to the rules hereinafter prescribed the amount of benefits which will ac-

crue to each tract or parcel of land and corporate property above named, by virtue of the works and improvements of said drainage district. Each tract or parcel of land, rights of way, and railroad bed, bridges, culverts and depots within the district shall bear its share of the entire cost and expenses incurred by said district in making said works and improvements in proportion to the benefits assessed whether such improvements be made on the tract or parcel of land, rights of way, or railroad bed or not. The engineer, in estimating the benefits to lands, streets, highways, railroad property, rights of way, railroad beds, not traversed by such works and improvements, shall not consider what benefits will be derived by said lands after other ditches, improvements, or drainage plans shall be constructed, but only the benefits which will be derived by the construction of the aforesaid works and improvements as they afford drainage or an outlet for drainage, or protection from overflow or damage by water. No assessment shall be made of benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of said improvements and works in affording drainage, of giving an outlet for drainage, protection from overflow, and damage from water. The benefits to public streets and highways, railroad property, right of way, and road bed, shall be assessed according to the increased efficiency and value added thereto by reason of and the protection derived from the aforesaid drainage works and improvements. Said engineer shall also classify said lots, tracts, lands and other property according to the benefit that each may receive from said drainage improvement. The lots, tracts and lands receiving the greatest percentage of benefit shall be classified at 100, those receiving a less percentage of benefit at such less number as its benefit may determine. The property of public and private corporations may be classified in a list by themselves, each according to the relation its total benefit bears to the total benefit in the district. The maps herein provided for shall be drawn upon a scale sufficiently

large to represent all of the meanderings of the proposed improvements, and shall show the boundary lines of each lot, or tract of land, and of each street, road, or railroad to be benefitted thereby, the name of the owner of each lot or tract of land, as it then appeared on the deed records, the authority or company having in charge or controlling each public or corporate street, road or railroad, the distance in feet through each tract or parcel of land, the acreage thereof and such other matters as the surveyor or engineer deems material. The profile shall show the surface, the grade lines, gradients, fixed and working sections and said report shall be filed with the board of supervisors of said district within sixty days after making said survey. (Amended in 1909.)

Sec. 5570. (Laws 1905, Chap. 161, Sec. 10, Comp. Sec. 6248, Revised Stat. Sec. 1814.) DRAIN COMMISSIONER.

The board of supervisors of any district organized under this law shall appoint some competent person to award all contracts contemplated in this article to the lowest bidder, subject to the approval of the board of supervisors, except as herein otherwise provided, to be known as the Drain Commissioner. He shall hold his office for one year and until his successor is appointed and qualified. He shall have a general superintendance of all works put under contract by said district, subject to the supervision and control of said board of supervisors, and shall report the same when completed according to the terms and stipulations of the contract, and certify the same to the board of supervisors who shall review and accept or reject the work so completed. Said Drain Commissioner shall, before entering upon the discharge of his duties, enter into bond with proper surety, subject to the approval of the board of supervisors, in any sum not less than two thousand dollars, nor more than ten thousand dollars, to the drainage district of which he shall be appointed Drain Commissioner, conditioned that he will faithfully and honestly perform all of the duties required of him by law, and deliver to his successor in office all instruments, papers, and documents that may have come to his hands by virtue of his office as said

Drain Commissioner, and shall take and subscribe the oath required by section seven of this act, 5567, which shall be endorsed upon his bond, and filed in the office of the County Clerk of the county in which said district, or the greater part thereof, shall be situated.

Sec. 5571. (Laws 1905, Chap. 161, Sec. 11, Comp. 6249, Revised Stat. Sec. 1815.) OTHER LANDS BENEFITED—PROCEDURE.

If, upon the filing of the report of said engineer, together with his estimates as hereinbefore provided, it shall appear that lands, other than those incorporated by the court in said district will be benefited by the drainage improvements of said district it shall be the duty of the chairman of said board of supervisors to file a petition in the district court of the county where said district was originally organized containing a description of said lands, the name or names of the owners as they appear on the tax duplicate of the county in which the lands are situated and their place or places of residence, and alleging that said land will be benefited by the improvements and ought in justice bear its proportion of the expense and cost of such improvement, and that said land was not incorporated within the limits of the said drainage district as originally established by said court, and if the names of the owners of any such tract or tracts of land are unknown this fact shall be stated, and praying that said tract or tracts of land may be incorporated and made a part of said district. Upon the filing of said petition duly verified as herein provided the clerk of the district court of said county shall issue summons or notice to the parties interested as provided by section two of this act with reference to the original petition for the establishment of said district, and the same proceedings shall be had upon said petition and in said court as upon the original petition for the establishment of said district, and the same provisions of law shall apply thereto in so far as the same are applicable; Provided, however, that upon the return day of said notice or summons or at any other time to which said court shall adjourn said cause the court

shall have jurisdiction to try and determine said matter at chambers and to make all necessary orders, judgments and decrees; Provided, further, that the owners of said land may by writing duly verified, waive the issuance and service of all notice or process and consent that the court may at once upon the filing of said petition and waiver enter the necessary decree. Upon filing said petition in said court it shall be the duty of the clerk to docket said cause, as a proceeding in and part of the original cause for the establishment of said district. After the entering of the decree of the court as aforesaid the land and all of the parties so brought into said district shall be subject to the same provisions of law as would have applied to them had they been incorporated in the original petition and decree entered thereon; Provided, further, that no land shall be included in said drainage district or subject to taxation for said drainage except wet, submerged and swamp lands or land within a district subject to overflow.

Sec. 5572. (Laws 1905, Chap. 161, Sec. 12, Comp. 6250, Revised Stat. Sec. 1816 and 1817.) METHOD OF CONDEMNING RIGHT OF WAY.

When said board of supervisors, by order entered of record, have agreed upon a location or route of said ditch or ditches and formulated a plan for the other improvements contemplated, then, they, in behalf of such district, shall have the right to acquire and if need be condemn any real estate, easement or franchise, whether the same be within the limits of such district or outside its boundaries, that may be necessary for a right of way over or upon which to construct and maintain the ditches, dykes, drains, and other works contemplated by any of the provisions of this act, and when the board of supervisors are unable to agree with the owners of any such property as to the acquisition of such right of way, or if the owners are not residents of the county, or can not be found, or are minors or persons of unsound mind, or incapable of making a legal contract, the board of supervisors when other means are not specifically provided, may present

to the judge of the county court of the county in which said land, easements or franchise are situated, a petition setting forth the location and character of the right of way needed and describing the lands to be crossed, the size of the ditches, levees, dykes and other works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of three appraisers disinterested freeholders of said county, to ascertain the compensation to be made, to such owners or parties interested. Upon the filing of said petition the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act. Provided, the district shall not be authorized to enter upon and appropriate any right of way until the damages awarded are paid to the judge of said county court for the use of the parties interested and if the damages are not so paid within two years from the filing of such commissioners' report, all proceedings as to the right of way not paid for shall abate at the cost of the district. Said board of supervisors, in behalf of such district, shall have the right to acquire, and if need be, condemn, in the same manner as is hereinbefore provided for the acquirement and condemnation of rights of way, any natural or artificial obstruction in any existing water course and remove the same therefrom for the benefit of said district.

Sec. 5573. (Laws 1905, Chap. 161, Sec. 13, Comp. Sec. 6251, Revised Stat. Secs. 1818-1820.) ASSESSMENT OF TAX—BENEFITS—PROCEDURE.

Within ten days after the filing of the report of the engineer as provided by section 9 of this act (5569) with the chairman of the board of supervisors of the drainage district, the chairman of said board shall call a meeting at some public place in the county in which the said district was organized, at which meeting the said board shall fix the time and place in

said county not more than 50 nor less than 40 days from the day of said meeting for the hearing of all objections to the report of said engineer, and to the classification of the lands and other property therein and all objections made by the owner or owners, of any land, property, easement or franchise upon which the said engineer proposes an assessment for benefits, as to whether the said classification is fair and just, and as to whether the said proposed assessment of benefits exceeds the benefits derived to their respective lands, and property from the said drainage improvements and all other matters and things connected with the proposed classification and assessment of benefits, in any way affecting said lands and property. The said board of supervisors shall give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, the last publication to be at least ten days before the day set for the hearing. It shall not be necessary in said notice for the said board of supervisors to name the parties interested and it shall be sufficient to say "notice is hereby given to all parties interested in the following described lands and property in _____ county, Nebraska, (here describe the lands and property) include within (here insert name of drainage district) that the engineer heretofore appointed to make a topographical survey of said drainage district and maps and profiles thereof, and a complete plan for draining, reclaiming and protecting said district and an estimate of the cost of the proposed drainage improvements, and to assess benefits to the property and lands in said drainage district and to classify the same, filed his report with the board of supervisors of (here insert the name of the drainage district) on the _____ day of _____ 19__, and you and each of you are hereby notified that you may file objections to said report within the time fixed by law.

_____

Chairman of the board of supervisors of drainage district Number_____of_____county, Nebraska."

A copy of the above notice fixing the time and place of said hearing together with a resolution adopting the same shall be spread on the records of said board. The said reports of the engineer shall be spread at large on the minutes of the proceedings of the board of supervisors of said drainage district, and the maps and profiles shall be placed on file with the secretary of the said board where all persons interested may have access to the same. (Amended 1909.)

Sec. 5574. (Laws 1905, Chap. 161, Sec. 14, Comp. Sec. 6252, Revised Stat. Sec. 1821.) OBJECTIONS TO ASSESSMENTS—APPLICATION FOR COMPENSATION—PROCEDURE.

The drainage district by its attorney or any owner of land or other property in said district whose land or property may be affected thereby may file objections to said report or to any item of the classification or the assessment of benefits therein set out, within ten days after the last day of publication of the notice provided for in the preceding section. All objections shall be heard by the board of supervisors fully and fairly and as speedily as may be to carry out liberally the purposes and needs of such drainage district. It shall not be necessary for said drainage district to file any answer or other pleadings to the objections, claims or other pleadings filed by said persons in answer to said proposed assessment as provided in this section, but said matters shall be deemed denied and said drainage district shall have the right to interpose any matters in defense thereto which it may have. Provided further, that said board of supervisors may adjourn any hearing or hearings for good cause from day to day, or to some future day as they may deem best, and that the said property owners for good cause shown by affidavit of themselves or agents may have said hearings adjourned for a period not to exceed two weeks. (Amended 1909.)

Sec. 5575. (Laws 1905, Chap. 161, Sec, 15, Comp. Sec. 6253, Revised Stat. 1822.) HEARING.

At the time and place fixed in said notice the board of supervisors shall meet for the hearing of the objections. If

they find that due notice has not been given as required by this act, they shall continue the hearing to a date to be fixed by them, and order the publication of the notice as hereinbefore provided, and when they find that due notice has been given, they shall proceed to hear any objection or objections that may have been filed upon which an issue has been made, and for that purpose shall have the power to subpoena, swear and examine witnesses and to do all things necessary and incidental to a proper hearing and adjudication of said issues and shall examine the maps, profiles, plans and report of said engineer and the items of the estimated cost of the drainage improvements recommended, and the classification of the lands and property in said district and the assessments of the benefits to the same as proposed by said engineer. After due consideration of all the evidence before them the said board of supervisors shall have power to adopt, amend, modify, or reject the plan for the reclamation and protection of the lands and property in said district recommended by the said engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken by said district and to estimate the cost thereof. From the decision of the said board on these matters no appeal will lie, but upon a proper showing at any time thereafter the said board may modify their order should such modification be necessary to promote the welfare of the drainage district. Said drainage board shall also have the power to establish the classification of the lands and property, and to determine and adjudicate the total amount of the benefit that will accrue to each lot, tract or parcel of land or other property in said district, from the drainage improvements. If an objection is overruled, the board may approve and confirm or modify the report as to the property affected, but if the objections are sustained, the board may amend, or modify the report in any particular, and if they find the said classification or assessment of benefits to the lands and other property to be in any respect inequitable, either less than or in excess of the benefits accruing to said lands and property from said drainage im-

provements or in any particular unfair and unjust, they shall so order, and they shall thereupon so amend, adjust and equalize the said classification and benefits as may appear fair, just and equitable to them. And when said board has in said manner adjusted, equalized and determined the classification of and assessment of total benefits to the lands and other property in said district as above required they shall enter an order confirming the same. Provided that all pleadings and other papers filed in the matter of said hearings shall be filed with the secretary of said board of supervisors and subpoenas and other process shall be issued by said secretary, and the said secretary shall be empowered to administer oaths to witnesses and to certify to records and papers under the seal of said drainage district. (Amended 1909.)

Sec. 5576. (Laws 1905, Chap. 161, Sec. 16, Comp. Sec. 6254, Revised Stat. Sec. 1823.) COSTS.

The costs of said hearing in case of contest shall be taxed and assessed as follows: First, if the said matter shall be determined by said board against the parties' contention objecting to said assessment, all costs upon the hearing of his said objections shall be adjudged against said objector. And said board of supervisors shall have the right to recover the same from said objector or objectors for the benefit of said drainage corporation in a civil action for that purpose before a justice of the peace or any other court of competent jurisdiction in the name of said drainage corporation. Second, in case said matter is finally determined by said board of supervisors partly in favor of, and partly against, the contention of any objector, or objectors, the costs shall be apportioned between the drainage district and said objectors as said board shall deem just and equitable. Third, in case the contentions of said objectors is wholly sustained and the matter is fully determined in their favor by said board, the costs shall be paid by said drainage district. The fees allowed upon said hearing shall be the same as those now allowed upon the trial of civil actions in courts of justices of the peace in this state.

Sec. 5577. (Laws 1905, Chap. 161, Sec. 17, Comp. Sec. 6255, Revised Stat. Sec. 1824.) APPEAL.

Any person or corporation who has filed objections and had a hearing as herein provided for feeling agrieved by the decision and judgment of the said board of supervisors, may appeal to the district court within and for the county in which said drainage district was originally established, upon giving a bond conditioned the same as in appeals to the district court as from civil actions in justices court in this state, and payable to said drainage corporation, and in addition thereto conditioned that they will pay all damages which may accrue to said drainage district by reason of said appeal, which bond shall be approved by the secretary of said board of supervisors, and filed with said secretary within ten days after the rendition of the decision appealed from, within ten days after the filing of the said bond said secretary shall make and file a transcript of said hearing together with all the papers relating thereto, with the clerk of the district court, in which said matter has been appealed Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, and the same shall be docketed and filed as in appeals in other civil actions to said court and said court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by said court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required. The clerk of the district court shall forthwith certify the decision of the court to the board of supervisors who shall take such action as may be rendered necessary by such decisions. (Amended 1909.)

Sec. 5578. (Laws 1905, Chap. 161, Sec. 18, Comp. Sec. 6256, Revised Stat. Secs. 1825-1828.) ASSESSMENT OF TAX—CERTIFICATE TO COUNTY CLERK—DUTIES

OF COUNTY CLERK.

As soon as the said board of supervisors have adjudicated, fixed and established the classification and benefits as provided by section 15 of this act, (5575), they may at once levy a tax on the lands and other property in said district to which benefits have been assessed, equal in amount to the cost of such drainage works and improvements as estimated by the said engineer and as modified and confirmed by said board, plus the actual expenses of organizing said district, the probably working and administrative expenses and damages (as estimated by the said board of supervisors) in the completion of said works and improvements, and the carrying out the objects of the said district, and in case bonds are issued, as provided in this act, then the amount of the interest (as estimated by the board of supervisors) which will accrue on such bonds shall be included, and added to the said tax. The said tax shall be apportioned to and levied on each tract of land or property in said district in proportion to the benefits assessed and not in excess thereof. The said board shall determine whether the said tax shall be collected and paid in a single assessment, or be divided into not to exceed twenty annual installments. The said levy of the tax, when so fixed and determined, shall be evidenced and certified by the board of supervisors, to the county clerk of each county in which lands of said district are situated, which certificate shall be substantially in the following form:

State of Nebraska,

---------- County, ss:—

To ----------, county clerk of said county:

This is to certify that by virtue of the provisions and terms of section 18 of article IV, of chapter 89 of the compiled statutes of Nebraska for 1909, the board of supervisors of (here insert name of drainage district) including lands and property in the counties of ---------- in the state of Nebraska, have and do hereby levy the special tax provided for in said section on the lands and property situated in your

county, described in the following table, in which table are: First, the names of owners of said lands and property as they appeared in the decree of the district court organizing said district, or as then shown by the deed records of said county; second, the description of the said lands and property opposite the names of the said owners; and third, the amount of said tax levied on each tract of land or piece of property: (here insert such table.) The said tax shall be collected and payable in _____ annual installments, the amount of each annual installment will be certified to you not later than the first day of September, in each year. Witness the signature of the chairman of the said board of supervisors, attested by the seal of said district and the signature of the secretary of said board on this_____day of_____, A. D. 190____

_____ _____

Secretary. Seal. President.

The said county clerk shall file said certificate in his office and record the same; provided further that if for any reason the cost of the drainage works and improvements exceeds the amount of the tax levied against the lands and property in said district as above set out, the board of supervisors may levy such other and further installments as may be necessary to complete the said works and improvements, but the total amount of all such levies and installments shall in no event exceed the total amount of benefits assessed to the lands and property in said district, such additional cost shall be apportioned to the lots, tracts, lands and property in the same proportion as in the first apportionment, provided, the board of supervisors shall first give notice thereof by causing a publication to be made once a week for two consecutive weeks in some newspaper published in each county in the district, the last publication should be at least ten days before the day set for hearing, provided further that the board of supervisors may correct erroneous assessments and grant relief therefrom, and may correct clerical or other manifest errors in the schedules of the apportionment of the cost, discovered, after being

certified to the county clerk. The said board of supervisors shall annually thereafter, determine, order and levy the amount of the installment of the tax herein before named which shall become due and be collected during said year at the same time, that state and county taxes are due and collected, and in case bonds are issued as provided by section 20 of this act (5580) then the amount of the interest, which will accrue on such bonds shall be included and added to said tax, which said annual installment and levy shall be evidenced and certified by the said board not later than September 1st of each year to the county clerk of each county in which lands of said district are situated which certificate shall be substantially in the following form: State of Nebraska, County of ----------, ss—: To----------, county clerk of said county. This is to certify that by virtue of the provisions of section 18, article IV, of chapter 89 of the compiled statutes of Nebraska 1909 (5578) the board of supervisors of ---------- drainage district including lands and property in the counties of ---------- in the state of Nebraska have and do hereby levy the annual installment of the total tax heretofore certified to you under the direction of said section 18 of this act on the lands and property situated in your county described in the following table in which are: First, the names of the owners of said lands and properties as they appeared in the decree of the district court organizing said district, or as shown by the certificate heretofore filed showing the total assessment against said property; second, the description of the said lands and property opposite the names of the owners; and, third, the amount of said annual installment and interest levied on each tract of land or piece of property—(here insert table.) The said installment of tax shall be collectable and payable the present year at the same time that state and county taxes are due and collected. Witness the signature of the chairman of said board of supervisors, attested by the seal of said district and the signature of the secretary of said board this -------- day of ---------,

A. D. 190____.

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Secretary. Seal. President.

Which said certificate shall be filed in the office of said clerk and said annual installment of said total tax so certified shall be extended by said county clerk on the tax books of the county against the real estate, right of way, road or property to be benefited, situate in such drainage district in the same manner that other taxes are now extended on the tax books of the county in a column under the head of "drainage tax" and shall be collected by the treasurer of the county in which the real estate is situate on which the tax is levied at the same time, and in the same manner, that the state and county taxes on said property are collected. Said county clerk shall be allowed the same fees as he receives for like services in other cases. (Amended in 1907 and in 1909.)

Sec. 5578x1. (Laws of 1909, Chap. 149, Sec. 2, Comp. Sec. 6256a, Revised Stat. Sec. 1829.) BOARD MAKE SUPPLEMENTAL ASSESSMENT.

Whenever it shall appear to the satisfaction of the board of supervisors that the levy theretofore made will be insufficient to pay the cost of the improvement or to pay the interest and principal of the bonds which the district desires to issue to pay the cost of such improvement, and that therefore a supplemental assessment is necessary to be made as in section 18 provided, (5579) the board shall by a resolution duly passed and entered in the record of its proceedings, declare the amount of such deficit and the purpose to which such additional assessment should be applied and shall thereupon cause to be made a supplemental assessment roll which shall apportion the amount necessary to be raised and declared as aforesaid upon the lands in the proportion of the former assessment, and shall set opposite each parcel of land (described by its legal description) the amount of such supplemental assessment expressed in dollars and cents. But upon said roll the real estate and the amounts of the several assessments

may be described by current and usual abbreviations if the board so desires. And thereupon the board shall proceed to enter judgment by confirmation upon said supplemental assessment roll, said supplemental levy or assessment, and shall be levied and certified in all respects as provided in said act to which this act is an amendment. And from time to time and as often as occasion may arise, supplemental assessments may be levied as in this section provided. In the event that any supplemental assessment is levied before any bonds are issued by the district, it shall be divided into installments payable when the installments of the first original assessment is payable and shall be collected therewith, and together they shall constitute one fund against which the drainage bonds may be issued as in said act to which this amendment is provided. (This section inserted in 1909.)

Sec. 5579. (Laws 1905, Chap. 161, Sec. 19, Comp. Sec. 6257, Revised Stat. Sec. 1830.) PUBLIC ROADS—RAILROADS.

That when any ditch, drain, improved water course, dyke, levee, or other drainage improvement, located and established under this act, crosses, drains, or protects either in whole or in part any street, highway, public or corporate road or any railroad, or benefits any or either of said streets, roads or railroads, the board of supervisors shall apportion and set off to the county or a township, if a county road, or to a company if corporated, or a railroad and to a city or village if a street or alley a portion of the cost and expense of the whole drainage improvements; the same as to private individuals and in proportion to the benefits conferred by such drainage improvements on said street, roads and railroads. Any apportionment of the cost and expenses of the drainage improvements that may be levied as a special tax or assessment against the property of any incorporated road, or any railroad, or any telegraph or telephone company for benefits accruing to the property of said corporations situated within the physical boundaries of such drainage district, shall be enforced and collected in the same manner that state and county taxes are enforced against them under the general revenue

laws of the state. Any apportionment of the costs and expenses aforesaid to a county, township, city or village, shall be filed as a claim, with the county, township, city or village clerk as the case may be, and may be enforced and collected as other judgments against such county, township or municipal corporation are enforced and collected. (Amended 1909.)

Sec. 5580. (Laws 1905, Chap. 161, Sec. 20, Comp. 6257a, Revised Stat. Secs. 131-1838 and 1841.) ELECTION TO BORROW MONEY AND VOTE BONDS.

The board of supervisors may, if in their judgment it seems best, issue negotiable bonds not to exceed the amount of the total tax levy certified to the county clerk or clerks as provided by section 18 of this act (5578), in denominations of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent payable semi-annually, to mature at annual intervals commencing after a period of five years, both principal and interest payable at the office of the county treasurer of the county in which said drainage district was organized or at some convenient banking house or trust company's office to be named in said bond which said bond and interest coupons shall be executed in the name of the district and shall be signed by the chairman of the board of supervisors, attested with the seal of said drainage district and by the signature of the secretary of said board. Such bonds shall be made to run for not more than 20 years, and in case said bonds are made to mature at different times, within said period, said assessment shall be divided into as many installments as there are different dates of maturity of said bonds. They shall be numbered consecutively as issued and bear date at the time of their issue. Provided that the maturity of said bonds shall be fixed on the first day of July of the year in which said bonds mature and such bonds shall contain a recital that the same were issued in accordance with the provisions of this act and that they are to be paid out of a sinking fund to be created as in this act provided. Before issuing any bonds under the provisions of this act, the board of supervisors of said district shall by resolution duly engrossed in the minutes of a meeting to be specially held

for that purpose order and direct the issue thereof, specifying their number, amount, rate of interest, when due, and where payable. The said minutes shall be engrossed on the record of said board of supervisors, which said minutes and the record of said bonds shall at all times be open to the inspection of all parties interested in said district, either as tax payers or bond holders, and on the payment of any bond an entry shall be made in said records accordingly. Said bonds shall not be sold for less than par with accrued interest, shall show on their face the purpose for which they are issued, and shall be payable out of moneys derived from the aforesaid drainage assessments or taxes. It shall be the duty of the board of supervisors in making the annual tax levy as heretofore provided, to take into account the maturing bonds and interest on all bonds, and make ample provisions in advance for the payment thereof. All bonds hereafter issued by any drainage district organized under the provisions of this act shall, before such bonds are sold or negotiated, be presented to the auditor of public accounts and he shall examine such bonds and all the proceedings relative to their issue, and if he be satisfied that such bonds have been legally issued as provided herein, register the same in his office in a book kept by him for such purpose, and under his seal of office certify upon such bonds the fact that they have been duly and legally issued, and that such bonds have been registered in his office in accordance with the provisions of this act; the data filed in his office being the basis for such certificate. It shall be the duty of the secretary of the board of supervisors of the drainage district in which said bonds may hereafter be issued, to transmit with such bonds to the auditor of public accounts a duly certified transcript of all the proceedings, previous to the issuance of such bonds, relative thereto, for the information of the said auditor, and it is hereby made the duty of such secretary to furnish such transcript to the holder of any such bond on demand; provided, however, that before such bonds are issued any person or corporation whose land or property has been assessed for benefits by said district, may pay the total amount of the cost and expenses appor-

tioned to and levied as a tax against such lands and property or any lot, tract or subdivision thereof as set out in the assessment roll. The amount of bonds to be issued shall be reduced by the amount thus paid; when such payment has been made to the board of supervisors they shall place the sum so received in the depository in this act provided for and shall give to said owner an acquittance showing such payment and such lands and property upon which payment has been made shall be released from the lien of such drainage tax and the bonds and interest thereon shall be chargeable solely against the lots, tracts, lands and property not making such payment. The drainage board shall certify to the county clerk a list of the lands and property upon which such payment has been made which list shall be filed and recorded in the office of said county clerk; provided further that before funds can be secured by the levy of a tax or the sale of bonds, the board of supervisors of such drainage district shall have power to borrow money and pledge the credit of the district for the payment of the same with interest in any sum not to exceed $5000.00 to pay the necessary cost and expenses of the organization and incorporation of said district and all other legitimate charges and expenses incurred by the board and its officers and employees in performing the services and duties required of them by this act. (Amended in 1907 and in 1909.)

Sec. 5580x1. (Laws 1909, Chap. 149, Sec. 1, Comp. Secs. 6257a and 6257a1, Revised Stat. Sec. 1839 and 1840.) ISSUE OF BONDS—PROVISIONS TO MEET SAME.

Before issuing any bonds the board shall pass a formal resolution in which shall be found and declared (1) the total amount of the tax as confirmed (both by the original and the supplemented assessment, if any), (2), and the total amount of the deductions, if any, thereon, (3) the estimated cost of collection, and (4) the total amount of the net tax available for the payment of the principal and the interest of the bonds the district shall intend to issue. The board shall then in said resolution divide the total levy theretofore made into convenient installments, and opposite each shall set the year in which they shall become payable respectively. The board

shall then (in said resolution) authorize the bonds which the district proposes to issue, fixing the terms, date and maturities thereof in such a manner that the installments of the tax will be sufficient to pay the corresponding installments of bonds as and when it becomes due. And in the same resolution the board shall provide that in due time, manner and season it will cause the annual levy to be made in compliance with such resolution, and thereupon the fund to the extent that it may be necessary to pay said bonds shall be pledged and hypothicated to the payment of said bonds which said pledge and hypothication to the amount so expressed and declared shall be superior to any other charge against the same. (Inserted in 1909 by amendment.)

Sec. 5581. (Laws 1905, Chap. 161, Sec. 21, Comp. Sec. 6257b, Revised Stat. Sec. 1846.) LIEN OF ASSESSMENT. All the assessments on real property and easements shall be a lien against the said property assessed from and after the first Monday in April in the year in which it is assessed and shall draw interest at the rate of ten per cent per annum from the first day of May of the year following said assessment, and such lien is not removed until the assessments are paid or the property sold for the payment thereof, and it shall be the duty of the county treasurers to collect such assessments in the same manner as other taxes against real estate are collected, and the revenue laws of the state for the collection and sale of land for such taxes are hereby made applicable to the collection of assessments under this act and when bonds have been issued by the drainage district the taxes so collected to pay the same shall constitute a sinking fund to be used for the payment of said bonds and the interest thereon.

Sec. 5582. (Laws of 1905, Chap. 161, Sec. 22, Comp. Sec. 6257c, Revised Stat. Secs. 1842-1845.) SALE OF BONDS BY BOARD. The board may sell said bonds, from time to time, in such quantities as may be necessary and most advantageous, to raise the money for the construction of said ditches and

works the acquisition of rights of way and property and otherwise to fully carry out the object and purpose of this act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Lincoln, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office, for the purchase of bonds till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event sell any of said bonds for less than par. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser. The proceeds of the sale of said bonds or any of them, shall be used to pay for the works and improvements in the drainage of said district and such costs, expenses, fees, and salaries as may be authorized by law. The money derived from the sale of any bonds shall be deposited by said board of supervisors with some bank or trust company in any county in said district under such conditions as the said board may prescribe and may be withdrawn from said depository when ordered by the said board on check or warrant signed by the chairman and countersigned by the secretary thereof. And said depository shall execute and deliver to the said board of supervisors of such drainage district, a bond with good and sufficient securities to be approved by the said board of supervisors, conditioned that said depository shall account for, safely keep, and pay over as required by law and as ordered to do by said board of supervisors any and all money received, by said depository, on account, for said drainage district. (Amended in 1907.)

Sec. 5583. (Laws 1905, Chap. 161, Sec. 23, Comp. Sec. 6257d, Revised Stat. Secs. 1847-1849.) BOARD MAY

CHANGE COURSE OF STREAM—CROSS RAILROAD.

In order to effect the drainage of said district, the board is authorized to clean out and remove all obstructions from the bed of any stream, creek, bayou, lagoon or other water course in said district, to straighten or shorten and deepen or widen the course of any stream or to abandon the bed of any stream and construct a new channel therefor, and to fill up any channel, or part of a channel of any stream, creek, bayou, or other water course in order to turn the direction of the volume of water or to concentrate the water so as to deepen and form a main channel. The said board shall have the power to construct the said works across any street, avenue, highway, railway, canal, ditch or flume which the route of said ditches may intersect or cross, in such manner as to afford security for life and property but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the privilege aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now, or may be the property of the state.

Sec. 5584. (Laws 1905, Chap. 161, Sec. 24, Comp. Sec. 6257e, Revised Stat. Sec. 1850.) BIDS FOR CONSTRUCTION—CONTRACT.

After the board of supervisors have certified the total levy of the costs and expenses of the drainage improvements to the county clerk as directed by section 18, (5578), they may proceed to let a contract for the construction of such

improvements, and for that purpose they shall give notice by publication thereof for 20 days in a newspaper of general circulation in the county or counties in which the drainage district is situated, and in such other newspaper as they may deem advisable, calling for sealed bids for the construction of said improvements or any part thereof, notifying the public thereby of the time and place where such bids will be received and opened, and where the plans and specifications may be seen. On the day fixed the board shall open and consider the bids and may let the contract for the whole work, or any part thereof to the lowest responsible bidder, or may reject any and all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contract for the purchase of materials shall be awarded to the lowest responsible bidder. The person to whom a contract is awarded shall enter into a bond with good and sufficient sureties to be approved by the board payable to the district for its use, for the amount of the contract price, conditioned for the faithful performance of such contract. The work shall be done under the direction, and to the satisfaction of the drain commissioner, and subject to the approval of the board. (Amended 1909, page 532, Chap. 147, Sec. 11, in force April 1.)

Sec. 5585. (Laws 1905, Sec. 25, Comp. Sec, 6257f, Revised Stat. Sec. 1851.) LIMITATION OF ACT.

None of the provisions of this act shall be construed as repealing or in any wise modifying the provisions of any other act relating to the subject of draining, reclaiming, or protecting swamp, overflowed, or submerged lands. Nothing herein contained shall be deemed to authorize any person, or persons, to divert the waters of any river, creek, stream, canal, or ditch from its channel to the detriment of any person or persons having any interest in such river, creek, stream, canal, or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use.

Sec. 5586. (Laws 1905, Chap. 61, Sec. 26, Comp. Sec. 6257g, Revised Stat. Sec. 1852.) TWO DISTRICTS INTERESTED IN THEIR OUTLET.

When two or more districts shall have their outlet or discharge into the same natural water course or stream and it shall become necessary to deepen or enlarge said natural water course or stream, each district shall be assessed for the cost of such work in the same ratio to such total cost as the discharge of water of such district bears to the combined discharge of waters of the several districts emptying into said natural water course or stream; but no district shall be liable to contribute for any improvement or costs and expenses incurred in improving said natural water course or stream above the point of discharge of the waters of such district into the same.

Sec. 5587. (Laws 1905, Chap. 161, Sec. 27, Comp. Sec. 6257h, Revised Stat. Sec. 1853.) RIGHT OF LANDOWNER TO DRAIN INTO DITCH.

The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or water course, as hereinbefore provided, shall have the right to use the ditch, drain or water course as an outlet for lateral drains from said land, lot or premises.

Sec. 5588. (Laws 1905, Chap. 161, Sec. 28, Comp. Sec. 6257i, Revised Stat. Sec. 1854.) SUBDISTRICTS—RIGHT TO CROSS OTHER LAND.

If any person who owns land within the drainage district which has been assessed for benefits and which is separated from the ditch, drain or water course for which it has been assessed, by the land of another or others, shall desire to ditch or drain his said land across the land of such other or others into such ditch, drain or water course and shall be unable to agree with such other or others on the terms and conditions on which he may enter upon their lands and construct such drains or ditch, he may proceed in the manner in this act provided, and the ditch or drain which he shall

construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established. He may file his petition with the clerk of the district court asking the said court to establish a sub-district within the limits of the original district for the purpose of securing more complete drainage, describing the lands to be effected thereby by metes and bounds or otherwise so as to convey an intelligent description of such lands; and all proceedings shall be the same as herein provided for the establishment formation and construction of original districts and improvement thereof, including the assessment of damages the assessment of benefits and when established and constructed, it shall be and become a part of the drainage system of such drainage district and be under the control and supervision of the board of supervisors.

Sec. 5589. (Laws 1905, Sec. 29, Comp. Sec. 6257j, Revised Stat. Sec. 1855 and 1856.) TREASURER—COLLECTION OF ASSESSMENTS.

The treasurer of the county in which the drainage district, or the largest portion thereof, is situated, shall be ex-officio treasurer of said drainage district, for the purposes of collecting and disbursing said tax or assessments, and the treasurers of the counties in which the smaller parts of the district shall be situated shall pay over to him any and all funds collected and paid over to them for the benefit of said drainage district, and shall take the receipt of the treasurer therefor, in duplicate, the original of which the treasurer paying the money shall keep for his own protection, and the duplicate shall be filed in the office of the clerk of the county of which the person receiving said money shall be treasurer. It shall be the duty of the treasurer, who is ex-officio treasurer of the drainage district, to pay any money in his hands, collected as aforesaid, upon warrants, signed by the chairman and attested by the secretary of the board of supervisors of the district, when the same shall be presented for payment. All warrants issued by the board of

supervisors of any drainage district shall be in the following form:

$---------No---------

Treasurer of the County of ----------:

Pay to ---------- Dollars out of any money in the Treasury belonging to ---------- Drainage District in the County of ---------- given at the town of ---------- State of Nebraska. By order of the Board of Supervisors of ---------- Drainage District.

Attest:

---------- ----------

Secretary. Chairman.

Sec. 5590. (Laws 1905, Chap. 161, Sec. 30, Comp. Sec. 6257k, Revised Stat. Sec. 1857.) DISTRICT WARRANTS TREATED SAME AS COUNTY WARRANTS.

The law of this state, under which county warrants are issued, sold, transferred, assigned, presented for payment and paid, shall apply to all warrants issued by virtue of the provisions of this act.

Sec. 5591. (Laws 1905, Chap. 161, Sec. 31, Comp. Sec. 6257l, Revised Stat. Sec. 1858.) PAY OF OFFICERS, HOW PROVIDED FOR.

The board of supervisors, except where otherwise provided shall, by resolution, at the time of hiring or appointing provide for the compensation for work done and necessary expenses incurred by any officer, engineer, attorney, or other employee, and shall also pay the fees of all court and county officers who may by virtue of this act render service to said district. (Amended 1909, page 524, Chap. 147, Sec. 12.)

Sec. 5591x1. (Laws 1909, Chap. 147, Sec. 14, Comp. Sec. 6257r1, Revised Stat. Sec. 1865.) APPLICATION TO PENDING PROCEEDINGS.

Where proceedings have been begun under the provisions of the sections hereby repealed, they may be proceeded with and completed under the provision of this act; provided that

all liens, remedies and processes for the collection of taxes provided for in this act shall, so far as applicable, be available for the collection of taxes levied and bonds issued under the sections hereby repealed; provided further, that in all cases where drainage districts have been incorporated under the said sections repealed and the work of drainage has been commenced or completed, in whole or in part, no rights or obligations incurred by district or individual shall be nullified, invalidated or for naught held. (The section inserted 1909, page 525, Chap. 147, Sec. 14.)

Sec. 5592. (Laws 1905, Chap. 161, Sec. 32, Comp. Sec. 6257m, Revised Stat. Sec. 1859.) ASSESSMENT FOR REPAIRS.

If at any time after the final construction of said improvements the same shall become out of repair, obstructed, inefficient, or defective from any cause, the said board of supervisors may order an assessment upon the lands benefited by said drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property in said district as a basis to ascertain the ratio that each separate tract or lot of land or property bears to the whole amount to be levied and said board shall fix and determine the amount of the assessment or tax that shall be levied against each separate piece of property in said district. And to meet the requirements of this act, which said assessment shall be limited to the amount necessary to make and complete said repairs, remove said obstruction, or remedy any such defect, or defects, and shall be levied and collected in the same manner as other assessments provided for in this act for the location, construction and operation of said system of drainage are collected, and expended. Provided, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed, or by the act or negligence of his agent or employee, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employee or agent then the cost thereof shall be as-

sessed and levied against the lands of such owner alone.

Sec. 5593. (Laws 1905, Chap. 161, Sec. 33, Comp. Sec. 6257n, Revised Stat. Sec. 1860.) CARE OF DITCH—OVERSEERS.

For the purpose of preserving any ditch, drain, dyke, or other works constructed or erected under the provisions of this act, the board of supervisors shall have the power to appoint not more than three overseers of their respective districts, who shall hold their offices for the term of one year; whose duty it shall be to keep the ditches, drains, dykes, and other works erected or constructed for the reclamation of the lands in the drainage district in good repair, and remove all obstructions from all ditches, drains, or water courses within their respective districts. It shall also be the duty of said overseers to cause the arrest of all persons who shall be known to have filled up, or put any timber or brush into, or to have in any way obstructed any ditch, drain, or water course, or have damaged any dyke, or other work erected or constructed for the reclamation of lands as aforesaid, within their respective districts, and bring them before a justice of the peace, or some other officer having jurisdiction for trial and punishment.

Sec. 5594. (Laws 1905, Chap. 161, Sec. 34, Comp. Sec. 6257o, Revised Stat. Sec. 1861.) PENALTY FOR INJURY OR OBSTRUCTION TO DITCH.

If any person shall wilfully obstruct or injure any ditch, drain, or water course, or damage or destroy any dyke or other work constructed under the provisions of this act, he shall be liable to the drainage district for the full amount of the injury occasioned by the damage thereto, the same to be recovered by a civil action in the name of the district before any court having jurisdiction thereof, and in addition thereto shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding the sum of one hundred dollars, and may be imprisoned until such fine and the costs of prosecution are paid.

Sec. 5595. (Laws 1905, Chap. 161, Sec. 35, Comp. Sec. 6257p, Revised Stat. Sec. 1862.) CONSTRUCTION OF ACTS.

This act shall be liberally construed to promote the drainage and reclamation of wet, overflowed or submerged lands, and the establishment of said corporation, and the collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court, or of the board of supervisors confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive and final that all prior proceedings were regular and according to law, nor shall any person be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby, at any stage of the proceedings, and if the court or board of supervisors shall deem it just to release any persons, or modify his assessment or liability, it shall in no manner affect the right or liability of any other person.

Sec. 5596. (Laws 1905, Chap. 161, Sec. 36, Comp. Sec. 6257q, Revised Stat. 1863.) IRREGULARITIES—INJUNCTION.

The collection of assessments to be levied to pay for the location, construction, maintenance, or repair of any ditch, levee, dyke, or water course, shall not be enjoined nor declared void; nor shall said assessment be set aside in consequence of any error, omission, or irregularity committed or appearing in any of the proceedings provided for by this act, and no injunction shall be allowed restraining the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from said district in an action brought for that purpose in case said injunction is made perpetual.

Sec. 5597. (Laws 1905, Chap. 161, Sec. 37, Comp. Sec. 6257r, Revised Stat. Sec. 1864.) EACH DISTRICT A CORPORATION—POWERS.

Every district organized under the provisions of this act shall be a body politic and corporate, and shall be known by

the corporate name of "Drainage District Number _____ of _____ County," and shall have power and authority to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, have and use a corporate seal, and exercise any and all other powers, as a corporation, necessary to carry out the purposes of this act.

## DESCRIPTION OF PHYSICAL CONDITIONS IN AND NEAR THE DISTRICT.

The incorporated Village of Jackson, which has a population of about four hundred people, is situated in Sections 35 and 36, Township 29, Range 7 east of the Sixth Principal Meridian in Dakota County, Nebraska. To the northwest thereof, and coming close to Jackson are hills intersected and divided by sharp ravines through, one of which flows in a southeasterly direction a well defined stream or water course known as Elk Creek, which constantly contains running water and has sharp and well defined banks and a channel and into which flows, above said Village of Jackson, the waters of tributary streams. In this way through Elk Creek is drained about 100 square miles of land in Dakota and Dixon counties, Nebraska. Close to the southern boundary of Jackson Elk Creek discharges all its waters onto a tract of flat, low, marsh or swamp land embracing from 18 to 20 contiguous sections, forming a compact body, and frequently by reason of melting snows and heavy rains the banks of said Elk Creek are overflowed and the waters thereof extend onto the small valley northwest of Jackson, through which it has its course, and all of said water is carried down stream and cast upon said low lands, and they are flooded for many days by reason thereof from a depth of one to three feet.

Jackson Lake or Cut-Off Lake is an abandoned channel of the Missouri River and from which to the Missouri River to the northeast there is an open channel or waterway.

From where Elk Creek reaches the open bottom to Jackson Lake or Cut-Off Lake along the line of the proposed ditch

is less than two miles and a quarter, and from the initial point of the proposed ditch following its line to Jackson Lake is about two and a half miles. From the same point following the line over which the water now flows to the nearest point at which it could be placed in the Missouri River is not less than thirteen miles, and following the line which the creek now takes to reach the river is not less than nineteen miles. The land in Dakota County bottom, unless overflowed by water, is all of the same general character, and is the finest of farming land to be found anywhere. This is evidenced by the price which the appellants fix upon their land through which the ditch runs and which is of the same general character as all of the Missouri River bottom land. Lying southeasterly from the initial point of the proposed ditch is the tract of low land above alluded to, in diamond shape, comprising something over 7,000 acres of land. This tract is the territory included within Drainage District No. 2 of Dakota County, Nebraska. It is skirted on the west and southwest by the Missouri River bluffs and is almost level, sloping gradually and slightly to the southeast, the slope or inclination being about a foot to the mile. Over this tract the waters of Elk Creek flow. This tract when drained will, for agricultural purposes, be more valuable than any other land in the state, as it has been fertilized by the flood water for hundreds of years and has never had its productiveness depleted by cropping. It is the purpose of Drainage District Number Two of Dakota County, Nebraska, to drain this 7,000-acre tract by carrying the water that flows through Elk Creek on to this district, two and a half miles to the northeast, and put it into Jackson or Cut-Off Lake and thence into the Missouri River, and by another ditch to take the water which naturally falls on the territory and which will flow from Pigeon Creek, which enters the district about west of its center, down over the line of natural flowage.

## ORGANIZATION OF DISTRICT.

On the 4th day of September, 1909, these defendants and other owners of these wet lands constituting a majority in interest of both owners and resident owners, filed in the District Court of Dakota County, Nebraska, a petition and proposed Articles of Association, in which they describe the district proposed by giving a continuous outline boundary inclosing it and then describing each particular tract of land owned by any single owner, or joint owners, giving the name of the owner and his address, stating that the land described will be benefitted by the proposed improvement, and if the owner was one of the petitioners alleging that he consented to the formation of the district and obligated himself to pay the taxes and assessments levied to pay for the improvement, and if he was not one of the petitioners alleging that he did not consent to the formation of the district. This petition was signed by more than a majority in interest of those who were resident owners and by more than a majority in interest of those who were owners. In determining the majority in interest an acre or lot was counted as a unit. (Pr. Tr. of Rec., pp. 24-26.) The necessary affidavit for service on non-resident owners was filed. (See Pr. Tr. of Rec., pp. 27, 28.) A summons in form prescribed by law under the Code, except only as modified by the drainage statute (Sec. 6240 Comp. Stat.), which fixed the return day on the first day of the next term of the district court, was served upon each and every owner a resident of Nebraska who had not signed the petition asking for the formation of the district. The service was made by the proper officer of Dakota County, as to those who resided within said county. (See Pr. Tr. of Rec., pp. 38-40.) Where owners resided in another county in the State of Nebraska, the summons was directed to the sheriff of that county and was served by him, the returns to such summons being the usual return and regular form. (See Pr. Tr. of Rec., pp. 41, 42.) An affidavit for personal service out of the state was made as to those defendants who were non-residents of the State of Nebraska. (See Pr. Tr. of Rec., pp. 27, 28.) The summons in each case where there was service

on a non-resident was issued in the same form as those directed to the sheriff of Dakota County, except that in addition thereto it specifically described the tract of land intended to be included in the district, gave the purpose of the district and time for which it was to continue. The sheriff of Dakota County deputized an individual who served said summons personally upon the defendants mentioned and swore to his return, and this applies to each and every non-resident defendant not petitioning for the creation of the drainage district. (See Pr. Tr., pp. 29-33.) On or about answer day, a number of persons who refused to consent to the formation of the district appeared in the District Court of Dakota County, Nebraska, and filed their objections to the formation of the district, raising the question of the constitutionality of the statute, the legality of the proceedings and the physical condition of the land owned by the objectors; that is, whether it would be benefitted by the drainage proposed. (See Ex. 10, Pr. Tr. of Rec., pp. 43-45.) The law questions raised by the objectors were presented to the court and overruled, and thereafter several days were taken in the introduction of evidence as to physical conditions. After such hearing the court found the facts necessary to the incorporation of the district in favor of the petitioners and the same was thereupon declared a corporation. (See Ex. 15 and Ex. 17, Pr. Tr. of Rec., pp. 50-53.) A copy of all the proceedings, including the articles of incorporation, service of process, objections, various orders of the court, including the final journal entry, duly certified to by the clerk of the district court, was filed in the office of the Secretary of State of Nebraska and the same kind of a record with a map of the district was filed in the office of the county clerk of Dakota County, Nebraska, both being done within twenty days after the order of the district court finding for the petitioners and declaring a corporation organized. (See Ex. 26 and Admission, Pr. Tr. of Rec., p. 61.) The plaintiffs did not and do not reside within the proposed drainage district and own no property within the district and were not made parties to or served with notice of the action taken to organize the district. (Par. 6 Pltf. Peti-

tion, Pr. Tr. of Rec., p. 3 and 52.)

## LAND OWNERS' MEETING.

The clerk of the district court thereupon made a call for a meeting of the owners of real estate situated in said district, fixing the 27th day of November, 1909, as the time and the court room in the court house in Dakota City (that being the county seat of Dakota County) as the place to hold an election to elect supervisors of said drainage district. (Ex. 18, Pr. Tr. of Rec., p. 53.) Said call was served upon the owners as required by the terms of the statute. (Ex. 20, 21, 22, 23, and 24, Pr. Tr., pp. 54-60.) There were present at said meeting sixty of the owners in person; there were present at said meeting by proxies twenty-five; there remained thirty-four of the owners (included therein are all minors who are owners, thirteen in number) who were not present. Guardians for six minors petitioned for and consented to the organization of the district and took part in the election. (See Ex. 28, Pr. Tr., pp. 62-64.) The defendants, excepting therefrom Fred Bartels and adding thereto Daniel Hartnett, were elected as supervisors of the district. Later on Daniel Hartnett resigned as supervisor, the defendant Fred Bartels was appointed supervisor until the next election, at which time he was elected to the term made vacant by the resignation of Daniel Hartnett. (Pr. Tr. of Rec., p. 64.)

## PROCEEDINGS AFTER ORGANIZATION.

A partnership composed of Roy Towl and Harry Nelson, and called "The Towl Engineering Company," was employed as the engineers for said district, (Pr. Tr., p. 66) and prepared a plan such as is required by Section 6247, Comp. Stat. (Section 5569 Cobbey's Annotated Statutes Ed. 1909), including all details therein mentioned. This was presented to and filed by the board of supervisors, and after a slight change in the gradient of the ditch was adopted, the line of the ditch being as is shown on both the exhibits of the plaintiffs and the exhibits of the defendants. (See Ex. 35 in Orig. Record of Pr. Tr. of Rec., pp. 67-69.) The assessments of benefits were made and approved practically as made.

## CONDEMNATION PROCEEDINGS.

The Constitution of Nebraska with reference to eminent domain is as follows:

"Art. I, Sec. 21. The property of no person shall be taken or damaged for public use without just compensation therefor."

The provisions of the Constitution of Nebraska with reference to courts and material to this controversy are as follows:

"Art. VI. Section 1. The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

"Section 15. There shall be elected in and for each organized county one judge, who shall be judge of the county court of such county, and whose term of office shall be two years."

"Section 16. County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices; and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars."

"Section 17. Appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases, on application of the defendant; and in all civil cases, on application of either party, and in such cases as may be provided by law."

The statute for the condemnation of railroad right of way follows:

Section 10517. (Laws 1866, R. S. Ch. 25, p. 217, Sec. 81; Comp. Stat. Sec. 2015; Rev. Stat. Sec. 5940). CONDEMNATION—COMPENSATION FOR PROPERTY APPROPRIATED.

"Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold, and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for stations, buildings, work shops, depots, machine shops, switches, side-tracks, turn tables and water-stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by acqueducts, and the right of making proper drains; provided, that the lands so held, taken and appropriated, otherwise than by the consent of the owner, shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth; and provided further, that no appropriation of private property, for the use of any corporation provided for in this sub-division, shall be made until full compensation therefor BE FIRST MADE OR SECURED TO THE OWNERS THEREOF; and Provided further, That any railroad company heretofore organized or that may hereafter be organized under said chapter 16 shall have the power and right to construct and operate interurban railroads, using motive power other than steam, and in the construction and operation of said interurban railroads shall have all the powers of eminent domain contained in said chapter."

Section 10531. (Laws 1866, R. S., p. 223, Ch. 25, p. 96; Comp. Stat. Sec. 2030; Rev. Stat. 5954). PROPERTY OF MINORS, ETC.—HOW ACQUIRED.

"Whenever any railroad corporation shall take any real estate as aforesaid, of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person, or such married woman

with the guardian of such husband may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate, and may give valid releases and discharges therefor."

Section 10523. (Laws 1866, R. S., Ch. 25, p. 224, Sec. 97; 1883, Ch. 18, p. 179, Sec. 1; approved February 20; amended 1903, Ch. 28, p. 267; in force August 1; Comp. Stat. Sec. 20316; Rev. Stat. Sec. 5946). RIGHT OF WAY—APPRAISEMENT OF DAMAGES.

"If the owner of any real estate, over which said railroad corporation may desire to locate its road, shall refuse to grant the right of way through his or her premises, the county judge of the county in which said real estate may be situated, as provided in this sub-division, shall upon the application of either party direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate and thereafter they shall assess the damages which said owner shall sustain by the appropriation of his or her land to the use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state. And such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before it enters upon said real estate, for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, it shall thereby be authorized to construct and maintain its said road over and across said premises. Provided, That either party

may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated within sixty days after such assessment. And in case of such appeal, the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay, or deposit with such county judge, the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment. Provided, That if on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; provided further, that either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited, shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court. And provided further, That any railroad company desiring to acquire by condemnation proceedings the right to construct and operate its railroad with certain restrictions as to the manner of operation or as to motive power, may in its petition to have property condemned set forth the manner in which and the motive power with which it proposes to operate its railroad and in such case in estimating the damages to property not taken the appraisers shall take into consideration the limitation set forth in said petition as to manner of operation and motive power and upon appeal a jury shall, in estimating damages to property not taken, take such limitations of manner of operation and motive power into consideration."

Section 10524. (Laws 1887, Ch. 16, p. 333, Sec. 1; in force March 31; amended 1905, Ch. 40, p. 279, Sec. 4; in force March 25; Comp. Stat. Sec. 2032; Rev. Stat. 5947). RIGHT TO APPEAL FROM ASSESSMENT OF DAMAGES.

"That either party shall have the right to appeal to the district court of the county where the lands are situated from

the assessment of damages allowed and mentioned in the next preceding section at any time within 60 days after the filing of the report of the appraisers with the county judge."

Section 10525. (Laws 1887, Ch. 16, p. 333, Sec. 2; in force March 31; term reduced from sixty days, 1905, Ch. 40, p. 179, Sec. 5; in force March 25; Comp. Stat. Sec. 2033; Rev. Stat. Sec. 5948). BOND ON APPEAL—CONDITIONS.

"That the party appealing shall within 30 days after such assessment enter into an undertaking to the adverse party with at least one good and sufficient surety, to be approved by the county judge of said county; conditioned, first, that the appellant shall prosecute such appeal to effect without unnecessary delay; and second, that if judgment be adjudged against the appellant on the appeal, the appellant shall satisfy whatever judgment may be adjudged against such appellant."

Section 10526. (Laws 1887, Ch. 16, p. 334, Sec. 3; in force March 31; amended 1905, Ch. 40, p. 280, Sec. 6; in force March 25; Rev. Stat. Sec. 5949; Comp. Stat. Sec. 2034). FILING TRANSCRIPT ON APPEAL.

"That the appellant shall within the 60 days allowed for such appeal procure and file in the office of the clerk of the district court a certified transcript of all the proceedings of such assessment, including also all papers and files relating to or connected with the assessment appealed from and the county judge shall upon demand make such certified transcript and deliver the same to the appellant."

Section 10527. (Laws 1887, Ch. 16, p. 16, p. 334, Sec. 4; in force March 31; amended 1905, Ch. 40, p. 280, Sec. 7; in force March 25; Comp. Stat. Sec. 2035; Rev. Stat. Sec. 5950). HOW APPEAL TREATED IN DISTRICT COURT.

"That upon the filing of such transcript in the district court within 60 days from the date of the filing of the appraisers assessment appealed from the appeal shall be deemed perfected and completed and the cause shall be docketed by the clerk of the district court making the owner of the land plaintiff in the appellate court and the railroad company de-

fendant therein and the parties shall proceed in all respects in the trial of said cause in the same manner as though the action had been originally instituted in such appellate court."

Section 10528. (Laws 1887, Ch. 16, p. 334, Sec. 5; in force March 31; amended 1905, Ch. 40, p. 280, Sec. 8; in force March 25; Comp. Stat. Sec. 2036; Rev. Stat. 5951). SEVERAL TRACTS JOINED IN ONE APPEAL.

"That assessments made for the right of way for the same railroad company upon and through different tracts of land belonging to the same owner or owners in the same right in the same county may be joined in one appeal and proceeded with in the appellate court as separate accounts joined in one action for damages to such tracts of land for and on account of such right of way."

Section 10529. (Laws 1866 R. S., Ch. 25, p. 225, Sec. 98; Comp. Stat. Sec. 2041; Rev. Stat. 5952). FREEHOLDERS TO ASSESS DAMAGES—NOTICE.

"Freeholders so appointed shall be the commissioners to assess all damages to the owners of real estate in said county. And said corporation may upon the refusal of any owner or guardian of any owner of lands in said county to grant the right of way as aforesaid, by giving the said owner or guardian ten days' notice in writing of the time and place of such assessment, have the damages assessed in the manner hereinbefore prescribed, and service of said notice may be made either by personal service or by leaving a copy thereof at the usual place of residence of said owner or guardian."

Section 10530. (Laws 1866, R. S., Ch. 25, p. 225, Sec. 99; Comp. Stat. Sec. 2042; Rev. Stat. Sec. 5953). SHERIFF SUMMON THOSE SELECTED TO FILL VACANCY.

"In case of the death, absence, or refusal or neglect of any of said freeholders to act as commissioners as aforesaid, the sheriff shall, upon the selection of said probate judge, summon other freeholders to complete the panel, and said commissioners shall proceed as directed in the preceding section. Said commissioners shall receive two dollars per day, each, for their services, and the same shall be taxed in the

bill of costs."

Section 10532. (Laws 1866, R. S., Ch. 25, p. 225, Sec. 100; Comp. Stat. Sec. 2043; Rev. Stat. Sec. 5955). RIGHT OF WAY THROUGH LANDS OF NON-RESIDENTS—HOW APPROPRIATED.

"If, upon the location of said railroad it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of such real estate, by publication four consecutive weeks in some newspaper published in the county where such lands may lie, if there be any, and if not, in one nearest thereto on the line of their said road, that said railroad has been located through his or her lands; and if such owner shall not within thirty days thereafter apply to said probate judge to have the damages assessed in the mode prescribed in the preceding sections, said company may proceed as herein set forth, to have the damages assessed, subject to the same right of appeal as in case of resident owners; and upon the payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this sub-division."

The defendants being unable to agree with Henry W. O'Neill, Cornelius K. Heffernan, the plaintiffs, and others, as to the amount of damage and compensation for right of way through their land for said ditch, a petition was filed by the defendants as supervisors of the drainage district, with the county judge of Dakota County, Nebraska, asking the appointment of appraisers to fix such damage and compensation, describing therein the line of ditch, the property through which it ran, the description of each tract, the owner thereof and the amount of land taken. (See Pr. Tr. of Rec. p. 69 and pp. 71-73). The appraisers were appointed, notified, took the oath of office, and after notice served on all of the owners, including the appellants or plaintiffs, proceeded to the performance of their duties in the assessment of damages and compensation. (See Exs. 40, 41, 42 and 45, Pr. Tr. pp. 74-76 and 80-83). The plaintiffs were present and participated in the

proceedings. (See Ev. H. C. Hansen, pp. 150-1, Ev. Henry O'Neill p. 151, Ev. Beacom, p. 149). From this award none of the appellants or plaintiffs appealed. Contracts were then let for the construction of the proposed improvements.

## FEDERAL QUESTIONS RAISED.

### In Trial Court.

On page 10 and the first three lines on page 11 of plaintiffs' brief is set forth at large paragraphs 15 and 16 of their petition. The allegations contained in these two paragraphs include the only attempts by the plaintiffs in the trial court to raise a federal question as touching the constitutionality of the act under which the district is organized, the condemnation proceeding under which the land proposed to be taken was appraised and condemned or the character of the purpose for which it is proposed to take the land. In paragraph 3 of the reply there is an attempt to question the constitutionality of Sections 14, 15, 16 and 17 of the Act, being Sections 5574, 5575, 5576 and 5577 of Cobbey's Ann. Stat. (Ed. 1909). In neither the 'brief' nor 'Supplement' is the constitutionality of these sections questioned.

### In the Supreme Court of Nebraska.

In the supreme court of Nebraska the appellants' only attempt to raise or present a federal question is the plaintiffs' third assignment and is found on page 16 of their principal brief and is as follows:

"The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment of the district court in holding Drainage District No. 2 to be a corporation, as in violation of Section 1 of the 14th amendment of the Constitution of the United States." (See 3rd assignment of error in State Supreme Court, Pr. Tr. p. 179).

The argument in support thereof is on pages 16 and 17 of the brief and, omitting the plaintiffs' statement of fact, is as follows:

"Our contention is that Section 1 of the 14th amendment

to the Constitution of the United States protects all persons in the freedom of contract, which means not only the right to contract, but to refuse to contract; and that it is not within the power of the legislature under any guise or in any form, to authorize the district court to enter a decree over their protest forcing them to consent to the incorporation of their property in a drainage district and to bear the burden and liability of such an organization. A clearer form of peonage or slavery could scarcely be imagined. And here again we are forcibly reminded that safety to persons and property is found only in a conscientious adherence to fundamental principles. This contention is so highly elementary that we cite no authority in its support."

The statutes of Nebraska provide as follows with reference to an appeal from the district court to the supreme court of the state:

Cobbey's Ann. Stat., Sec. 1702. (Sec. 7265 Comp. Stat. Rev. Stat., Sec. 8186.)

"PROCEEDINGS TO OBTAIN REVERSAL.

"The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the Supreme Court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for a new trial in said cause; the filing of such transcript shall confer jurisdiction in such cause up the supreme court."

History.—Laws 1907, Ch. 162, p. 495, Sec. 1; in force August 1.

Cobbey's Ann. Stat., Sec. 1703a. (Sec. 7265b Comp. Stat. Rev. Stat. Sec. 8188.)

"NOTICE OF APPEAL.

"It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within ninety days after the rendition thereof, a notice of intention to prosecute such appeal, signed by the appellant or appellants or his or their attorney of record, but if such notice is not given the Supreme Court may provide by rule for notice after the appeal is lodged in that court."

History.—Laws 1907, Ch. 162, p. 496, Sec. 3; in force August 1.

Cobbey's Ann. Stat., Sec. 1703b. (Sec. 7265c Comp. Stat. Rev. Stat., Sec. 8192.)

"BRIEFS.

"The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief."

History.—Laws 1907, Ch. 162, p. 496; Sec. 4; in force August 1.

PROPOSITIONS CONCEDED BY DEFENDANTS.

The following propositions in the briefs of the plaintiffs are conceded and no attempt will be made by the defendants to distinguish or discuss cases cited in support thereof.

Drainage District Number 2, of Dakota County, Nebraska, has no corporate existence as a corporation de jure unless it is lawfully incorporated under what was then termed the "Peabody District Drainage Bill" as amended in 1907 and 1909 and set forth as Sections 5561 to 5597, both inclusive,

Cobbey Annotated Statutes. (Ed. 1909).

It is conceded that the act makes a drainage district organized under its provisions a public corporation although it drains but 160 acres of land; provided always, that the court shall have found the improvement it proposes will be conducive to the public health, convenience and welfare. But it is insisted that some board, person or tribunal—in this case the district court—must first find that the proposed improvement will be conducive to the public health, convenience and welfare. That once formed, it becomes a corporation with a public purpose and may be so lawfully declared, and is a public corporation. A majority in interest of the owners of such a corporation can control the administrative functions of the corporation within the limitations of the act by electing those favorable to the views of the majority in interest.

An act which authorizes the taking of private property for a private purpose is void.

If the organization is private and if its purpose is private it cannot exercise the rights of eminent domain.

That the legislature cannot by its action make a private purpose a public one, and that whether the use is a private one or a public one is a judicial question.

That the constitutionality of an act is to be tested by what may lawfully be done under its authority.

Notice to the land owner of the time at which the appraiser will appraise land taken under the right of eminent domain is necessary with opportunity to be herd before the appraisers.

A state cannot by violating its constitution impart vitality to an act and make it due process of law under the Fourteenth Amendment to the Constitution of the United States.

The decision of a state court as to what is "due process of law" does not bind the federal court where the question as to whether the particular proceeding is due process of law under the Fourteenth Amendment to the Constitution has been presented to the state court.

That no man can be coerced into corporate relations with others in a private or profit sharing corporation.

That land cannot be taken under the power of eminent

domain unless it is thereafter to be devoted to a public use.

That the state must have a voice in the manner in which the public may avail itself of the use.

If the act is unconstitutional it can be attacked in these proceedings if presented to the state courts, but the act must have been attacked in the state courts upon the same grounds it is attacked in this court.

## QUESTIONS PRESENTED BY THE RECORD IN THIS CASE.

Having in mind that only federal questions which were raised in the state courts, can be considered in this court, defendants assert that:

(a) There are but two possible federal questions which, if properly raised, might be presented by the record in this case, (1) Is the "Peabody Drainage Statute" in violation of the Fourteenth Amendment to the Constitution of the United States, and (2) Is the actual use to which Drainage District No. 2 of Dakota County, Nebraska, shall put the land proposed to be taken, a public one. As to all other questions urged by the plaintiffs they are concluded because they are not federal questions.

(b) The Peabody Act is not in violation of any provision of the Constitution of the United States or of any amendment thereto, the organization of the district being in conformity with the provision of a valid statute and the benefit to be obtained thereunder being for the public.

(c) The purpose of the district in the taking of the lands of the plaintiffs is to provide for, preserve and conserve the public health, convenience and welfare, and it has been so found by the state courts and such finding concludes the plaintiffs.

(d) The Peabody Act in placing upon the district court the duty of determining the existence or non-existence of facts necessary to authorize the creation of a drainage district presents no federal question, and is not in violation of the Fourteenth Amendment of the Constitution of the United

States or of any provision of the Federal Constitution.

(e) The Peabody Act in permitting a "Majority in Interest" of the owners to present a petition and articles of association for the incorporation of the district presents no federal question, and is not in violation of the Fourteenth Amendment to the Constitution of the United States or of any provision of the Constitution.

(f) That (1) the petition of plaintiffs nowhere alleged that the Peabody Drainage Statute itself is in violation of the Constitution of the United States, or of any amendment thereto. (2) That it is nowhere alleged in the plaintiffs' petition that the use to which the district will put the land proposed to be taken is not a public one. (3) That so far as any allegation may go as to the private character or function of the district or of the use to be made of the land, the fact has been declared by the state legislature in the act attacked and has been found against the plaintiffs by the trial court and that finding affirmed by the Supreme Court of the state and there is no evidence in the record which would support any other finding.

(g) The question, that Section 1, of Article IV., of the Constitution, was violated in any manner, was not raised in the state court, and, in fact, the manner in which elections were held under the act, or the manner in which the district was organized through the order of the district court do not present federal questions.

(h) That the plaintiffs were not notified of the application for the appointment of appraisers to condemn the right of way, presents no federal question and violates no provision of the Constitution of the United States or of any amendments thereto, and was not raised in the state courts.

(i) Lot 5, belonging to Henry W. O'Neill, does not contain forty acres or even fifteen acres. Outside of the right of way taken, (.67 acres), none of it will be submerged and whatever damage will be done in any way to lot 5, is covered and compensated for by the amount awarded by the appraisers and presents no federal question.

(j) The state courts did not hold that Drainage District

No. 2 of Dakota County, could take the lands of the plaintiffs without condemning them and paying the plaintiffs' therefor.

(k) The line of location of the ditch was certain and in conformity with the laws of the state of Nebraska and in questioning it plaintiff presents no federal question.

## ARGUMENT.

### THE PEABODY DRAINAGE STATUTE VIOLATES NO PROVISION OF THE CONSTITUTION OF THE UNITED STATED OR OF THE FOURTEENTH AMENDMENT.

It is urged by the plaintiffs that the act under which the district was organized is unconstitutional for each of the following reasons:

1. That in assigning to the district court the duty of determining whether or not the facts exist which will authorize the creation of a public croporation and whether or not the owners objecting will be benefited, there was an invasion of legislatvie function by the judiciary.

2. That in confining the right to vote in the landowners meetings to owners of real estate there was a violation of Section 4 of Article IV. of the Constitution of the United States guaranteeing to every state a republican form of government.

3. That acting within the provisions of the act private property may be taken for a private purpose, and that the purpose for which plaintiffs' land is being taken is a private one.

### 1.

### There Is No Invasion of Legislative Functions by the Judiciary.

There is nothing in the Constitution of the United States or in any amendment thereof which forbids the legislature of a state or territory to exercise judicial functions.

Satterlee vs. Matthewson, 2 Pet. 380, 413; 7 L. Ed. 458, 469.

Baltimore & Susquehanna R. Co. vs. Nesbit, 10 How.

395, 400; 13 L. Ed. 469, 471.

Dreyer vs. Illinois, 187 U. S. 71, 83-4.

The state court has held that the Peabody Act is not in violation of the state constitution because of the provision referring to the courts the determination of these questions.

Neal vs. VanSickel, 72 Neb., 105.

Barnes vs. Minor, 80 Neb., 189, 191-2.

Drainage District No. 1 vs. Richardson County, 86 Neb., 355, 363-4.

O'Neill et al. vs. Leamer et al., 93 Neb., 786-791.

Since this case was decided the same questions have again been presented to the supreme court of Nebraska and its former decisions adhered to and approved in:

Drainage District vs. C., B. & Q. R. Co., 96 Neb., 1, 2-4.

The district court under the act complained of and under which the district was organized has one function—that of determining the existence or non-existence of certain facts. When the existence of these facts has been determined the legislative declaration creates the corporation.

The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act and such act does not violate the Fourteenth Amendment of the Constitution.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 178; 41 L. Ed., 369, 395.

While this case concerned an irrigation district it was considered, so far as the questions involved were concerned, as of the same character as a drainage district. (See opinion, pages 173-5, L. Ed., 390-1).

"Neither the United States Constitution nor its Amendments were designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legis-

lation of a special character, having this object in view, must often be had in certain districts, such as for the draining of marshes and irrigating arid plains. Regulations for these purposes may press with more or less weight upon one than upon the other, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but the promote, with as little individual inconvenience as possible, the general good."

Barbier vs. Connolly, 113 U. S. 27; 28 L. Ed. 923; 5 Sup. Ct. Rep. 357.

It is thoroughly established in the Supreme Court of the United States that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contract or the deprivation of property without due process or unequal protection of the laws by states are not violated by the exercise of legislative power in securing public safety, health and morals.

New York & N. E. R. Co. vs. The Town of Bristol, 151 U. S., 556, 567, 571; 38 L. Ed. 269, 272-3, 274.

The manner in which a state may provide for the creation of a corporation will be binding upon the Supreme Court of the United States.

Hancock vs. Louisville etc. R. Co., 145 U. S. 409, 36 L. Ed. 755.

Secombe vs. C., M. & St. P. R. Co., 23 Wall. 108, 23 L. Ed. 67, 69.

The creation of an entity with power to act as a corporation, although it is not so called, is sufficient.

Secombe vs. Railroad Co. (Supra).

In Soliah vs. Heskin, 222 U. S., 522, the court says:

"The Fourteenth Amendment does not deprive a state of the power to determine what duties may be performed by local officers, or whether they be appointed or elected by the people.

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a state

from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature, The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under Section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every state in this union. And whenever the supreme court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the federal courts can neither deny the correctness of the construction nor repudiate its binding force as presenting anything in conflict with the federal constitution.

"Forsyth vs. Hammond, 166 U. S., 506, 519."

"Neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution."

Davidson vs. New Orleans, 96 U. S. 97, 105-6.

2.

The Manner of Voting Provided by the Peabody Act Violates No Provision of the Constitution of the United States or any Amendment Thereof.

This objection to the statute has not been urged in the arguments presented by the plaintiffs. It is raised by the 23rd assignment of error as a violation of the Fifteenth Amendment to the Constitution of the United States. It is apparent that the right to vote under this statute is in no way effected by "race, color or previous condition of servitude."

The right to vote depends upon the state law and not upon the Fifteenth Amendment. The Fifteenth Amendment prohibits the states from making race, color or previous condition of servitude a basis for depriving one of the privilege of suffrage. The right of suffrage is not a necessary attribute

of national citizenship.

United States vs. Cruikshank, 92 U. S. 542, 555, 23 L. Ed. 588.

Minor vs. Happersett, 21 Wall. 162, 178, 22 L. Ed. 627.

United States vs. Harris, 106 U. S. 629, 637, 27 L. Ed. 290.

Pafe vs. Williams, 193 U. S. 621, 48 L. Ed. 817.

Each of the different states has the power to prescribe the qualification of its officers and the manner in which they shall be chosen.

Boyd vs. Nebrasa, 143 U. S. 135; 36 L. Ed. 103.

Taylor vs. Beckham, 178 U. S. 548, 571; 44 L. Ed. 1187.

Wiley vs. Sinkler, 179 U. S. 58; 45 L. Ed. 84.

Swafford vs. Templeton, 185 U. S. 487, 491; 46 L. Ed. 1005.

Pafe vs. Williams, 193 U. S. 621, 633; 48 L. Ed. 817.

It is no part of the judicial functions of any court of the United States to prescribe the qualifications of voters of a state.

Luther vs. Borden, 7 How. (U. S.) 1, 41; 12 L. Ed. 581.

The question of the right to vote at the election held at the meeting of the landowners of the district giving each owner as many votes as he has acres was passed upon in State vs. Hansen, 80 Neb., 724, 746, 748, and held to be valid and in no respect a violation of Section 1, Article VII., of the Constitution of Nebraska, fixing the qualification of voters at general elections. See also

State vs. Cones, 15 Neb. 444.

Board of Directors vs. Collins, 46 Neb. 411.

So far as material to, if raised in this case, it was passed on in the decision now here for review and as to any provision of the state constitution or law it has been held valid.

O'Neill et al. vs. Leamer et al., 93 Neb., 786.

The first intimation that the provision of this statute as

to the manner of holding elections and the qualification of the voters was invalid is the 23rd assignment of error. The question was never presented to the state courts and therefore cannot be considered now.

To justify the United States Supreme Court in taking jurisdiction the federal question must be specifically set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the constitution or some statute or treaty of the United States and such intention must be declared in some unmistakable manner.

Keokuk, etc., Bridge Co. vs. Illinois, 175 U. S. 626; 44 L. Ed. 293.

Oxley Stave Co. vs. Butler Co., 166 U. S. 648; 41 L. Ed. 1140.

To give the Supreme Court jurisdiction of a writ of error to a state court, it must appear by the record that a federal question was raised.

Inglee vs. Coolidge, 15 U. S. (2 Wheat.) 363; 4 L. Ed. 261.

Fisher vs. Cockerill, 30 U. S. (5 Pet.) 248; 8 L. Ed. 114.

Crawford vs. Branch Bank of Alabama, 48 U. S. (7 How.), 279; 12 L. Ed. 700.

Parmelee vs. Lawrence, 78 U. S. (11 Wall.), 36; 20 L. Ed. 48.

Brooks vs. Missouri, 124 U. S. 394; 8 Sup. Ct. 443; 31 L. Ed. 454.

Powell vs. Brunswick County, 150 U. S. 433; 14 Sup. Ct. 166; 37 L. Ed. 1134.

Ansbro vs. United States, 159 U. S. 695; 16 Sup. Ct. 187; 40 L. Ed. 310.

Capital Nat. Bank vs. First Nat. Bank, 172 U. S. 425; 43 L. Ed. 502.

Phoenix Ins. Co. vs. Treasurer, 78 U. S. (11 Wall.), 204; 20 L. Ed. 112.

The Supreme Court has no jurisdiction to review the judgment of a state court on writ of error, unless it affirmatively appears from the record that a question giving the Su-

preme Court jurisdiction was made by the pleadings, and passed on by the court.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.) 317; 12 L. Ed. 169.

Gray vs. Coan, 154 U. S. 589; 14 Sup. Ct. 1168; 38 L. Ed. 1088.

Chouteau vs. Gibson, 111 U. S. 200; 4 Sup. Ct. 340; 28 L. Ed. 400

Sayward vs. Denny, 158 U. S. 180; 15 Sup. Ct. 777; 39 L. Ed. 941.

The jurisdiction of this court to review the proceedings of state courts is limited to specific instances of denials of Federal rights specially set up in and denied by the state courts.

Marshall vs. Dye, 231 U. S. 250.

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86, 97.

Kewman vs. Portland, 223 U. S. 151, 56 L. Ed. 386.

A federal question not specifically set up or claimed in a state court cannot be considered on writ of error from Supreme Court of the United States to the State Court merely because another federal question not connected with it was raised in the state court.

Keokuk vs. Hamilton Bridge Co. vs. Illinois, 175 U. S. 626; 44 L. Ed. 299.

Dewey vs. Des Moines, 173 U. S. 193; 43 L. Ed. 665.

The enforcement of the provision in Article IV., Sec. 4 of the Constitution that the United States shall guarantee to every state in the union a republican form of government depends upon political and governmental action through the powers conferred on the congress and not those conferred on the courts.

Marshall vs. Dye, 231 U. S. 250.

Pacific Telephone Co. vs. Oregon, 223 U. S. 118, 56 L. Ed. 377.

## CASES CITED BY PLAINTIFFS.

From pp. 49 to 55 of plaintiffs' brief is a discussion of some of the decisions by the Nebraska court. All of the questions there discussed so far as material have been already presented by this argument to this court, so far as necessary, in the citation of authorities already made except the case of Jenal vs. Green Island Draining Company, 12 Neb., 163. There is no question but that the case of Jenal vs. Green Island Draining Company is the law in the State of Nebraska. So far as material to the present issue it is, in place of being in favor of plaintiffs' contention, a decision against the plaintiff in this case. The statute there considered by the court was one wherein the purpose was purely private and the corporation likewise private and under such conditions the supreme court of Nebraska held that such corporation had no power to exercise the right of eminent domain. This decision of the court was before it when the present case was presented and when all of the other cases cited in defendants' brief were considered by the court. And certainly when the case of O'Neill et al. vs. Leamer et al. was presented it was considered by the court and in whatever manner presented was decided and decided adversely to the plaintiffs' contention. That is the effect of the decision in this case, that you cannot take private property for a private purpose, but the purpose in the present case is public.

Within the limits that can reasonably be taken, with an argument such as this, it is impossible to review each of the multitude of cases cited by plaintiffs in the "brief" and "supplement" and if separately reviewed and considered the defendants would be compelled to say and do say that in each of the cases cited and quoted from in the "brief" and "supplement" on the question of the purpose contemplated in the statute attacked by the plaintiffs in this action that no one of the cases supports their contention. Each case is based upon the particular state of facts presented by its record and the peculiar provisions of each statute. Just as in the case of Jenal vs. Green Island Draining Company, supra, the Su

preme Court of Nebraska found the purpose to be private and held that the law was unconstitutional so far as it conferred the right of eminent domain, so in each of the cases cited from where it has been held that the statute was unconstitutional there have been facts in the record disclosing that the purpose was private and it was so found. As an illustration we will take the case of Cypress Pond Draining Company vs. Hooper et al., 2 Met. (Ky.) 350, 456, cited on page 47 of the supplement. This is a decision which is strong in its terms condemning the right of the draining company and declaring invalid the act under which they pretended to work. A reading of the opinion, however, discloses that although condemning the act in question still the court recnizes the existing power in a proper case to drain lands and use the power of eminent domain.

The authorities therefore cited on pp. 67 to 95 inclusive of plaintiffs' brief, and pp. 44 to 65 inclusive, of the "supplement" brief, will not be reviewed further than to say that outside of the cases decided by this court and the decision of the Nebraska Supreme Court, both of which have been referred to, there is no case which is in point as to this particular statute or as to a similar statute. Many of the cases so cited by plaintiffs are against their own contention and in favor of the position taken by this court and by the Supreme Court of the State of Nebraska in the cases which have been presented here.

We ~~have already~~ shall called attention to the rule as announced by many of the supreme courts of other states in this union. (See authorities cited on pp. 69 to 70 of this brief).

3.

## UNDER THE PEABODY ACT PRIVATE PROPERTY CANNOT LAWFULLY BE TAKEN FOR A PRIVATE USE OR PURPOSE.

Under Section 3 of the Act (Cobbey Ann. Stat., Sec. 5563; Comp. Stat., Sec. 241; Rev. Stat., Sec. 1799) the questions for investigation and consideration are, "why such drainage

district should not be organized and declared a public corporation of this state, and why their (the objectors') land will not be benefitted by drainage and should not be embraced in the drainage district and liable to taxation for draining the same."

A drainage district properly organized and whose "purpose" or "use" is public is of the same character as school districts, road districts, townships, villages, etc., and are termed or known as public corporations.

Such corporations are sometimes termed quasi-municipal corporations.

Beach vs. Leahy, 11 Kan., 23.
Fourth School Dist. vs. Wood, 13 Mass., 193.
Harris vs. School Dist., 28 N. H., 61.

But whatever the designation the function is a public one.

A corporation is private as distinguished from public unless the whole interest belongs to the government or the corporation is created for the administration of political or municipal power.

St. Bk. of Ohio vs. Knopp, 57 U. S. (16 How.) 369, 14 L. Ed. 977.
Vincennes University vs. Indiana, 55 U. S. (14 How.) 268, 14 L. Ed. 416.

If under Section 3 of the Act now under consideration it is necessary to determine whether or not there are conditions warranting the creation of a public corporation it follows that in the creation of a drainage district under such law the court or judge must have been satisfied that the purpose was public; that it was not private; that the use was for the public health, convenience and welfare; that the government or public will for all time own the use or benefits procured.

State vs. Hanson, 80 Neb., 724, 740-48," makes such a finding necessary before a district can be created. (See to the same effect, State vs. Board of County Com'rs., 87 Minn., 325, 60 L. R. A. 161.)

The fact that every declaration of the Supreme Court of

Nebraska has been that these drainage districts are public corporations requires that the board or court called upon to pass upon the petition seeking to have a drainage district created must of necessity determine whether or not the purpose is a public one and that the conditions necessary to a public corporation exist.

Sections 25 and 28 (Cobbey Ann. Stat., Secs. 5585 and 5588; Comp. Stat., Secs. 6257F and 6257I; Rev. Stat., Secs. 1851 and 1854), carry with them the principal that there is continued governmental control and a use for all within the district. The entire act when considered together shows only a purpose to benefit the public and in this particular case a large portion of the public.

The criticism of the Peabody Act as indulged in by the plaintiffs because the purpose is private is not well taken. It it conceded that under this act an improvement may be carried through when only 160 acres of swamp or overflowed land may be affected. If the owners of 81 acres desire drainage and the court shall have found that it is a proper case to create a public corporation, that the proposed improvement will promote the public health, convenience and welfare, it is proper and right to organize a public corporation and the purpose is public.

State vs. Hansen, 80 Neb., 738, 740-746.

Barnes vs. Minor, 80 Neb., 189.

Plaintiffs complain of this opinion in State vs. Hansen because it is by a commissioner, but the opinion in Barnes vs. Minor is by a member of the court and the fact is that the above decision so questioned is approved and adopted by the court in the opinion now here for review.

O'Neill et al. vs. Leamer et al., 93 Neb., 786, 789.

Also in the following cases:

Wheden vs. Wells, 95 Neb., 517, 520.

Drainage District vs. C., B. & Q. R. Co., 96 Neb., 1.

White vs. Papillian Drainage District, 96 Neb., 241, 242.

It follows, therefore, that such districts are considered public corporations by the legislature of Nebraska and have

been so declared by its courts.

This court has well said in Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 160, with reference to irrigation: "The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question."

And what has been so forcefully said with reference to irrigation in California applies with equal force with reference to the drainage of lands such as that included within Drainage District No. 2 of Dakota County, Nebraska.

This court has decided that drainage of lands is for a public purpose in the following cases:

Hagar vs. Reclamation Dist. No. 108, 111 U. S. 701, 705; 28 L. Ed., 569.

Willson vs. Blackbird Creek Marsh Co., 27 U. S., 245, (2 Pet., 245, 252); 7. L. Ed., 412.

Wurts vs. Hoagland, 114 U. S., 609, 612; 29 L. Ed., 229.

Mugler vs. Kansas, 123 U. S., 623; 31 L. Ed., 205.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 173-5; 41 L. Ed., 369, 390-1.

Sweet vs. Rechel, 159 U. S., 380; 40 L. Ed., 188.

C., B. & Q. Ry. Co. vs. Illinois, 200 U. S., 561, 585-6.

We quote from the opinion in the latter case, from pages 585-6. The court says: "We assume that the drainage statute in question is entirely consistent with the constitution of

Illinois. It is so regarded by the Supreme Court of the state, and that is all sufficient in this case. We assume also, without discussion—as from the decisions of the state court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the state may by appropriate agencies exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and commerce of the state. Their value is increased and thereby their contribution in taxes to the state and local governments is increased."

"C., B. & Q. Ry. Co. vs. Illinois, 212 Ill., 103, 119.

It is conceded that this public purpose cannot be certainly and effectively attained except through the plan adopted by the Drainage Commission."

The district in the Illinois case contained but 2,000 acres, while 7,000 acres are to be drained by the district whose purpose is attacked in this action.

No court in this union will be found holding that the drainage of lands under the conditions presented in the present case is not a public purpose and for the public benefit.

The following decisions by state courts hold that a purpose to drain lands under conditions similar to those present in this case is a public purpose authorizing the exercise of the power of eminent domain.

Laguna Drainage Dist. vs. Charles Martin Co., 144 Cal., 209; 77 Pac., 933.

Heick vs. Vogt, 110 Ind., 279; 11 N. E., 306.

Poundstom vs. Baldwing, 145 Ind., 139; 44 N. E., 191.

Heffner vs. Cass & Morgan Counties, 193 Ill., 439; 62 N. E., 201; 58 L. R. A., 353.

C. C. C. & St. L. Ry. Co. vs. Polecat Dr. Dist., 213 Ill., 83; 72, N. E., 684.

Sisson & Bd. of Sup. vs. Buena Vista Co., 128 Ia., 442; 104 N. W., 454; 70 L. R. A., 440.

Talbert vs. Hudson, 82 Mass. (16 Gray), 417.
State vs. Bd. of Comrs. of Polk Co., 87 Minn., 325; 92 N. W., 216; 60 L. R. A., 161.
Mound City Land & Stock Co. vs. Miller, 170 Mo., 240; 7 S. W., 721; 60 L. R. A., 190; 94 Am. St. Rep., 727.
Norfleet vs. Cromwell, 70 N. C., 634; 16 Am. Rep., 787.
Porter vs. Armstrong, 139 N. C., 179; 51 S. E., 926.
Lewis County vs. Gordon, 20 Wash., 80; 54 Pac., 779.

Courts will give great weight to the legislative declaration that a purpose is public, implied from the giving the right of eminent domain for such purpose and such declaration in the absence of proof to the contrary is sufficient.

Lang Sault Devel't Co. vs. Kennedy, 143 N. Y. S., 454; 158 App. Div., 398.

The fact that private individuals will be benefitted does not prevent it being a public use if the many are benefitting or when the public are interested.

Jeter vs. Vinton-Roanoke Water Co., 76 S. E., 921; 114 Va., 769.
O'Neill vs. Leamer, 142 N. W., 112; 93 Neb., 786.

## REVIEW OF PLAINTIFFS' ARGUMENT ON CONSTITUTIONALITY OF ACT.

The fact that those who do not join in the petition for the organization are given the opportunity to show: (a) why the district shall not be declared a public corporation (having in mind the doctrine laid down in State vs. Hansen Supra), and (b) why their land will not be benefited, are two reasons why this district and any district organized under this act cannot be a private corporation or organized for a private purpose.

On pages 59-60 of the plaintiff's brief, as proving that the corporation is private, attention is challenged to the provisions in Section 13 of the Act (See Section 5573, Cobbeys Ann. Stat., Ed. 1909), relating to the method of fixing the benefits to each tract, and then follows the statement that an

appeal from the decision of the board of supervisors (which is the tribunal with original jurisdiction), is prohibited. Section 17 of the Act (Section 5577, Cobbeys Ann. Stat., Ed. 1909), expressly provides for an appeal from the decision of the board on the assessment of benefits. Plaintiffs refer to this section and to its effect on page 60 of their brief. In Section 15 (Section 5575, Cobbeys Ann. Stat., Ed. 1909), it is provided, "after due consideration of all the evidence before them, the said board of supervisors shall have power to adopt, amend, modify, or reject the plan for the reclamation and protection of the lands and property, in said district recommended by said engineer and to determine the location, character and extent of the works and improvements necessary and to be undertaken by said district and to estimate the cost thereof. From the decision of the board on these matters no appeal will lie." By this provision they are given the same discretion as to the plan of drainage to be adopted that any board or person invested with administrative functions has. From the assessments of benefits which is the basis of taxation, appeal is expressly provided also by the constitution of the state. (See Section 24, Art. I., of Constitution).

Just why the private character of the corporation is deducible from the fact that the board of supervisors are authorized to levy a tax, as is stated on page 60 of Plaintiffs' Brief, is not clear. The fact is that the levying of taxes or imposing of assessments is not the function of a private corporation and belongs only to public or quasi public corporations.

On page 60 of their brief the plaintiffs urge that the organization is private because no one residing outside of the district is permitted to drain into it. This is a misstatement. Residence in or out of the district in no way has to do with the right to protection from water afforded by the district's improvement. The section referred to (Section 27), is for the purpose of securing all rights to those who have contributed to the improvement. It is probably true that one, whose land is outside of the district, would not be entitled to change the course of drainage of such land, and place the burden of

its drainage on the district's improvements until he had arranged to pay his share of the cost of the improvement. So he would be prevented from doing the same thing with a sewerage system of a city or town.

The "majority in interest" *cannot* bring into the district any outlying property. (Plaintiffs' Brief, page 61). If it is found upon investigation that other land ought to be in the district, the supervisors, after a hearing, had, upon due notice, when it shall have been determined that the lands will be benefited by the proposed improvement, may secure an order annexing such lands to the district. In such a case, however, the same proceeding is had as in the organization of the district, and none but lands wet, swampy, submerged or subject to overflow, may be so brought in. (See Section 11, Section 5571 Cobbeys Ann. Stat. ).

Pages 61 to 64 of plaintiffs' brief are taken up with a collection of phrases, intended to show that the majority of owners in interest may control this corporation or any one organized under such a law. After the corporation has been organized (and that requires a finding by a court that the same will be conducive to the public health, convenience and welfare), its administrative functions may be so controlled within the limitations of the act. And so it should be, certainly the minority should not control. Concede the question of a public purpose and the house of cards constructed by the plaintiffs crumbles. No man's land can be forced into this district against his will, unless it has been found upon a hearing by the court,—to which has been delegated by the legislature the duty of investigating that question—that the purpose is public—in other words, that it will be conducive to the public health, convenience and welfare.

If the facts in the supposed case, found on pages 64-5 of plaintiffs' brief, are as they intend them, the corporation could not be created. With only 150 acres of wet or overflowed land no corporation need be created under this act, although it might present a condition when it would be for the public health, convenience and welfare.

Again, A, B, C, D and E, in the supposed case, could not be forced into the corporation against their protest, unless it was first shown that the facts presented a case for a public corporation and that their lands would be benefited by the proposed improvement, and no land can be taxed more than the benefit to be derived by it from the improvement. (See Section 9, Section 5569 Cobbeys Ann. Stat., Ed. 1909). It is supposed by the plaintiffs that the "Majority in Interest," may be a corporation, and then follows the statement that it could elect its own officers as supervisors. It seemes hardly necessary to say that a stockholder in a land owning corporation is not by reason of that fact, a holder or owner of real estate. The supervisors must be owners of land within the district and a majority of the board must be residents of the county. (See Section 5, Section 5565 Cobbeys Ann. Stat., Ed. 1909).

All of the various suggestions and criticisms of the act under which Drainage District No. 2 was organized, so far as they are the facts, would apply to any law providing for public improvements under which there is an assessment against adjoining or adjacent property.

## METHODS OF DRAINAGE IN NEBRASKA.

During the argument of plaintiffs in error there has been considerable stress laid upon the fact that there are other methods of drainage under the laws of the State of Nebraska which will not, against the will of the owner, force him into a drainage district. While we do not think that the existence or non-existence of such condition is pertinent to the present inquiry, still we shall briefly consider the several acts by which drainage might be had in Nebraska as compared with the method taken in the organization of this district. All of the methods of drainage in Nebraska are found gathered together in Chapter 19 of the Revised Statutes of Nebraska (Ed. 1913), there being seven, and they are set forth in seven different articles under that chapter, an article being given to each method.

FIRST METHOD.

The first method is what is known as the County Board method, and was established in 1881, by which one owner or more may petition the County Board for the formation of a drainage district, giving its proposed boundaries, method of drainage and filing a bond conditioned upon the payment of the expense of investigation necessary to determine whether or not a drainage district should be organized. (Cobbeys Ann. Stat., Sec. 5502; Comp. Stat., Sec. 6181; Rev. Stat. 1721). The County Board then take such advice as they feel in need of, investigating by a personal view the territory proposed to be erected into the district, and if the County Board after such view decide that it is for the public welfare and conducive to the public health and convenience to establish such district, they order it established and there is no appeal from their order.

Dodge County vs. Acom, 61 Neb., 376.
Tyson vs. Washington County, 78 Neb., 211-220.

SECOND METHOD.

The second method is drainage by incorporated companies, that is, certain persons owning land by following the proceedure become an incorporated company, not a municipal or public corporation, and under this method they are not allowed to condemn lands, and it was under this method the decision of Jenal vs. Greensland Draining Company, 12 Neb., 163, was made, and it has never, at any time, by any person, been contended that such a drainage district was a public or quasi-public corporation, or suited to conditions similar to those presented in this case. (Cobbeys Ann. Stat., Secs. 5528-5542; Comp. Stat., Secs. 6206-6220; Rev. Stat., Secs. 1756-1770).

THIRD METHOD.

The third method is set forth in Article 3 of Chapter 19, and is what is known as drainage for agricultural or sanitary purposes. A petition of one or more persons is presented to the County Board and the County Board investigate as to whether the organization of a district for either sanitary or

agricultural purposes will be justified at that place and including the territory mentioned in the petition. (Cobbeys Ann. Stat., Sec. 5546; Comp. Stat., Sec. 6224; Rev. Stat., Sec. 1774). If they decide in the affirmative notice is then given to the land owners and at the hearing then fixed the question of the public welfare may be taken up and considered, but in this as in the first method one petitioner may force the organization of a drainage district and compel drainage regardless of the desires of the remainder of the owners and residents within the district. All that is necessary in addition to one petition is the finding by the board.

## FOURTH METHOD.

The fourth method is that which was pursued in the present case, and the method is provided for in Article 4 of said Chapter 19. It requires first the filing of a petition signed by a majority in interest of the owners of the land in the district proposed to be erected. After the filing of this petition it requires the service of a notice, if on a resident owner the service must be personal, if without the state of Nebraska then the service is the same as that required for the service on non-resident defendants in civil actions. A time for hearing is fixed and at that hearing two questions are determined: First, ought, under the circumstances, a public corporation be erected or created, and Second, as to each individual owner ought he, by reason of benefits to accrue to his lands, to be included within that corporation. With reference to the inclusion of other lands it must always be and remain a question to be investigated after notice to the owners of lands to be brought in, first whether the lands are proper lands to be brought into the district and whether the taxes assessed will be proportionate to the benefits, and they can only be brought in after notice and a hearing had.

## FIFTH METHOD.

The fifth method is what is known as the Knowles Act, or organization by the vote of the land owners. It is Art. V. of Chap. 19 of the Rev. Stat. In this case one-fourth if

there are 20 owners or less within the proposed district, or if more than 20 then ten or more petitioners ask for the calling of an election. (Cobbeys Ann. Stat., Sec. 5599; Comp. Stat., Sec. 6257r2; Rev. Stat., Sec. 1867). The petition is filed with the county clerk and notice of the proposed formation of the district and fixing the time and place of the election is published. No personal service is made, however. There is simply a published notice that at a certain time the election will be held. At that election each acre or fractional part of an acre is entitled to one vote and if a majority of all the votes cast at such election is in favor of the formation of the district the district shall be declared formed as a municipal corporation. The statute provides that the vote at such election shall be conclusive as to the question of whether or not the district is for a public utility or for the public welfare and benefit, but the supreme court of the state has held that is not effective until there is a finding by the board of county commissioners that it is for the public welfare before an election may be called and a district organized.

State vs. Hansen, 80 Neb., 724, 739-748.

## SIXTH METHOD.

The sixth method is with reference to the drainage of lakes and has no application whatever to such a case as this. (See Art. VI., Chap. 19, Rev. Stat.)

## SEVENTH METHOD.

The seventh method is a sanitary drainage district and relates exclusively to drainage for sanitary purposes and to drainage as effecting towns and villages situated upon a stream. Again in this method an election is called and each legal resident within the district is entitled to a vote, and if a majority of all of the votes cast are for the creation of a sanitary district it will be created. In this method, however, the county board must first determine whether or not the district ought to be created and the boundaries. (See Art. VII., Chap. 19, Rev. Stat.)

It is, therefore, apparent that there is no method pro-

vided for draining lands in Nebraska in which a land owner in a proper case cannot be forced into the district even though he protests at all times against its creation and against being included within its boundaries. In the first method one man may force him into a drainage district. In the second method it is a private corporation draining and not pertinent to our case. In the third method one man can petition for and secure the creation of the district. In the method we are using no person can be forced into a district unless, first, a majority of all the owners in interest are actively favorable to the formation of the district; second, that it is a proper case for the creation of a public corporation, and third, that the land of the owner will be benefited thereby. Each particular tract of land or each particular owner in this method may have the fact as to whether he is being benefited tried out. In the fifth method without any notice whatever to the land owners the boundaries of the district may be fixed on a petition of not more than ten and then by a vote of those persons owning land in the proposed district one who does not want to be within may be forced in by an election where each acre has a vote without even actual notice of the election. A majority of votes cast at the election determines whether or not the district shall be created. It should be noted that under the "Peabody Act" the passive land owner, the minor, the insane owner, are counted against the organization as the petition filed in the district court must be signed by a majority in interest of the land owners. Under the "Knowles Act" it only requires a majority of those voting at the election to insure the creation of the district. (Cobbeys' Ann Stat., Sec. 5605; Comp. Stat., Sec. 6257; Rev. Stat., Sec. 1873).

It follows that of all the methods applicable to the drainage of lands, such as those in this district, the Peabody Act is the one most friendly to the "reluctant land owner."

## CONDEMNATION OF RIGHT OF WAY.

(A) Due process of law.

(B) The manner of condemnation in Nebraska under the

Peabody Act.

(C) The act complies with the requirements of the Fourteenth Amendment to the Constitution of the United States.

(D) In this case the state proceedure was strictly complied with.

(E) This is a collateral attack upon the proceedure.

(A)

DUE PROCESS OF LAW.

The words "due process of law" are intended to convey the same meaning as the words "by the law of the land" in Magna Charta.

Murray vs. Hoboken Land Co., 59 U. S. (18 How), 272; 15 L. Ed., 372.

The phrase "due process of law" refers to the state's own process.

In re Mahon, 34 Fed., 525.

The term "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass on their subject-matter; and, if that involves merely a determination of the personal liability of defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance.

Pennoyer vs. Neff, 95 U. S., 714; 24 L. Ed., 565.

Davidson vs. New Orleans, 96 U. S., 97, 105-6.

Due process of law is its regular administration, through the courts of justice, by a timely and regular course of proceedings to judgment and execution. As a rule it includes parties, regular pleadings and a trial, according to the settled course of proceedings.

Den vs. Hoboken, etc. Co., 59 U. S. XV., 273; 86 U. S., 72.

It does not require a trial by jury.

U. S. vs. Ferreira, 54 U. S., 40.

Jurisdiction of the subject matter is power to deal with general abstract questions in empowering the court to determine each issue within the scope of its authority according to its own view of the law and the evidence. Whether its decision is right or wrong each judgment or decision so rendered is final and conclusive upon the parties to it unless reviewed by writ of error or appeal or impeached for fraud.

Foltz vs. St. Louis & S. F. Ry. Co., 60 Fed., 316, 318.

Insley vs. United States, 150 U. S., 512; 37 L. Ed., 1163.

Des Moines N. & R. Co. vs. Iowa Homestead Co., 123 U. S., 552; 31 L. Ed., 202.

In re Sawyer, 124 U. S., 200.

The acts of a municipal corporation cannot be said to be wanting in the due process of law guaranteed by the Constitution of the United States or the Fourteenth Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment.

Owensboro Waterworks Co. vs. Owensboro, 200 U. S., 38; 50 L. Ed., 361; 26 S. Ct., 249.

Law in its regular course of administration through the court of justice is due process and when secured by the law of the state the constitutional requirement is satisfied.

Leeper vs. State of Texas, 139 U. S., 462; 35 L. Ed., 225.

The state may provide that the decision of the appraiser in a condemnation proceeding, shall be final and it is due process of law.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685; 41 L. Ed., 1165.

Shoemaker vs. United States, 147 U. S., 282, 305; 37 L. Ed., 170.

Louisville, etc. R. Co. vs. Kentucky, 183 U. S., 503, 515; 46 L. Ed., 298.

In the exercise of the right of eminent domain inquiry as to the amount of compensation provided for in some appropriate way before some properly constituted tribunal, con-

stitutes due process of law.

Backus vs. Ft. Street Union Depot Co., 169 U. S., 557, 568; 42 L. Ed., 853, 859.

"It is firmly established that when parties have been fully heard in regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of its property without due process of law within the 14th Amendment to the Constitution of the United States."

Bonner vs. Gorman, 213 U. S. 91.

"In summing up the essentials of due process of law in condemnation cases, this court said all that is essential is that in some approved way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

Appleby vs. Buffalo, 221 U. S. 532.

(B)

MANNER OF CONDEMNATION.

Under Section 12 of the Peabody Act (Cobb. Ann. Stat., Sec. 5572; Comp. Stat., Sec. 6250; Rev. Stat., Secs. 1816 and 1817), it is provided that the district shall have the right to exercise the power of eminent domain and that it shall be done by securing the appointment of three disinterested freeholders as appraisers and the condemnation proceedings to be the same as that which is applicable to the condemnation of railroad right of way. (See page 14 of this brief.)

Sections 10517, 10531, 10523, 10524, 10525, 10526, 10,527, 10528, 10529, 10530, 10532 of Cobbeys Ann. Stat. (Comp. Stat., Secs. 2015, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2041, 2042 and 2043; Rev. Stat., Secs. 5940, 5954, 5946, 5947, 5949, 5951, 5952, 5953, 5955), are the sections by which the proceedure for condemnation of railroad right of way, so far as material to this case, is prescribed. In Section 10523, Cobbeys Ann. Stat. (Comp. Stat., Sec. 2031), it is provided that either

the railroad or the owner of real estate may apply to the county judge to have appraisers appointed. Upon the application being filed the appraisers are appointed by the county judge without regard to either party, it being his duty to appoint disinterested freeholders of the county. These freeholders are then notified or summoned by the sheriff of the county and appear before the county judge and qualify by being sworn. Having been sworn they then proceed to view the land and upon actual view appraise the damages. Sec. 18529 of Cobbeys Ann. Stat. (Comp. Stat., Sec. 2041), * expressly provides "and said corporation may upon the refusal of any owner or guardian of any owner of land in said county to grant the right of way as aforesaid by giving said owner or guardian ten days' notice in writing of the time and place of such assessment have the damages assessed in the manner hereinbefore prescribed and service of said notice may be made either by personal service or by leaving a copy thereof at the usual place of residence of said owner or guardian." (See pp. 45-51 of this brief.)

Secs. 10324, 10325, 10326, 10327, Cobbeys Ann. Stat., (Comp. Stat., Secs. 2032, 2033, 2034 and 2035), provides and secures to either party a right of appeal, the conditions of appeal and the proceedure by which the appeal is affected from any report which said appraisers may make first to the district court and second to the supreme court.

## (C)

## THE ACT COMPLIES WITH THE REQUIREMENTS OF DUE PROCESS OF LAW.

As we have seen all that is necessary is a duly constituted tribunal with notice of a time and place for hearing with the privilege of appearing and being heard. All of these privileges are accorded under the statute and were given to the plaintiffs in the present case.

Section 10523 of Cobbeys Ann. Stat. provides that the board of appraisers "shall hear either party interested therein in reference to the amount of damages when they are so

inspecting and viewing said real estate."

Section 10529 requires that the land owner or guardian shall be given ten days' notice in writing of the time and place of assessment; if residents of the state the notice must be personal, that is, delivered to the individual or left at his usual place of residence.

Where there is no constitutional provision prescribing the tribunal before which condemnation proceedings should be brought, the legislative power has authority to designate it.

> Spring Valley Water Works vs. Schottler, 110 U. S. 347, 382; 28 L. Ed., 173.
>
> United States vs. Jones, 109 U. S., 513, 519; 27 L. Ed., 1015.

One already in existence may be chosen or a special one may be created.

The constitution of Nebraska not having created a tribunal before whom condemnation proceedings should be conducted, the legislature made it one of the duties of the county judge, upon application, to appoint disinterested freeholders as appraisers. (See Sec. 10523, Cobbeys Ann. Stat.) The defendants followed this course.

The statute providing for the condemnation of railway right of way has been before the Supreme Court of Nebraska for construction and that court has held that all persons interested in the land to be affected are owners and necessary parties.

> State vs. Missouri Pac. R. Co., 75 Neb., 4, 9-10.

The same court has held that notice to the owners is necessary.

> Trester vs. Missouri Pac. R. Co., 33 Neb., 171, 185.

The question of whether or not sufficient notice has been given is one for the determination of the state court, when the action is brought under the state statute.

> Baltimore Traction Co. vs. Baltimore Belt R. Co., 151 U. S., 137; 38 L. Ed., 102.

Hence this case so far as notice to the plaintiffs is concerned presents no federal question.

(D)

Here then is a tribunal legally constituted requiring the owner to be notified of the proceeding with the right of appeal and jury trial preserved.

Not only this, but in the proceeding to condemn, the land owner may be herd before the county judge, not as to value, but as to other matters he may desire to litigate material to the condemnation.

F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 98, 101-102.

CONDEMNATION PROCEEDINGS.

Having been notified the plaintiffs' appeared and took part in the proceedings. (See Pr. Tr., pp. 149, 150-1).

They have had their day in court. They took their chance before the tribunal provided by the legislature and cannot now be herd to impeach its judgment.

Exhibit 45, Bill of Exceptions, Vol. 3, pages 175-187, (See Pr. Tr., pp. 80-83, 89-90, and pp. 1-10 of Supplemental Record), is the notice to the plaintiffs and others with the officer's return showing service upon the plaintiffs. It contains a description of each tract of land crossed, the width of the strip taken and the number of acres taken from the tract with the name of the owner. It was offered and received in evidence in the trial court. (Bill of Exceptions, Vol. 1, p. 66).

The trial court and the supreme court of Nebraska found that the notice complied with the requirements of the state laws.

Unless the state law is in conflict with the Federal Constitution no federal question is presented.

This court will examine the act of the state legislature and determine whether it violates the Federal Constitution, an Act of Congress or a treaty, and it may examine its application by the state court, but this court will go no further.

As we have shown, the plaintiffs were given their day in court before a legally constituted tribunal before which they had been duly summoned and before which they might

have raised every question now presented.

Being a constitutional exercise of legislative power and providing a suitable remedy by trial in the regular course of justice to recover compensation for injury to the land of plaintiffs, it has not deprived them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9, 26.
Walker vs. Sauvinet, 92 U. S., 90.
Davidson vs. New Orleans, 96 U. S., 97.
Hurtado vs. California, 110 U. S., 516.
Hagar vs. Reclamation Dist., 111 U. S., 701.

The decision by the state court that a particular formality is or is not essential under a state statute presents no federal question, if the statute as thus construed is sufficient to provide due process of law.

Castillo vs. McConnico, 168 U. S., 674; 42 L. Ed., 622.

Because a statute might be construed so as to violate due process of law does not raise a federal question. It must be applied so as to violate due process.

Id.

A decision that the advertisement was sufficient by state court is only on local law.

Id.

The mode of exercising the right of eminent domain, in the absence of any provision of organized law prescribing a contrary course, is within the discretion of the legislature.

There is no limitation on the power of the legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken.

Secombe vs. Railroad, 23 Wall., 108; 23 L. Ed., 67.
Backus vs. Fort Street Union Depot Co., 169 U. S., 557, 570; 42 L. Ed., 853.
C., B. & Q. R. Co. vs. Chicago, 166 U. S., 226, 236; 41 L. Ed., 979.

It has already been pointed out that the district is a corporation with public functions and by the state courts declared to be a public corporation. The decisions of the court have

been cited holding such corporations public and the purpose public.

In Wurts vs. Hoagland, 114 U. S., 609; 29 L. Ed., 229, Justice Gray, after reviewing the New Jersey case, says: "The case comes within the principle upon which this court upheld the validity of general Mill Acts in Head vs. Amoskeag Mfg. Co., 113 U. S., 9. The statute of 1871 is applicable to any tract of land within the state which is subject to overflow from freshets or which is usually in low, marshy, boggy or wet condition. It is only on the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute the plan and no commissioner can be appointed against the remonstrances of the owners of the greater part of the lands. All persons interested have also an opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

"As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the law, nor been deprived of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

## NOTICE OF SELECTION OF APPRAISERS.

There was no notice served on the plaintiffs of the filing of the application or the petition for the appointment of the appraisers to appraise the right of way; none was required; no person a party to the action or interested had a right to select the appraisers. No hearing was had nor does the statute provide for one. If one had been had ex parte it would have been good cause for complaint. The county judge

could appoint any person having the requirements fixed by the statute.

Due process of law does not require notice and a hearing on the appointment of the tribunal to assess the benefits and damages resulting from a drain.

Beenus vs. Guirl Drainage Co. (Ind.), 105 N. E., 496.
Taylor vs. Drainage Dist. No. 56 (Ia.), 148 N. W., 1040.

Want of notice to the land owner of the hearing on the necessity of taking the land does not constitute deprivation of due process.

Bd. of Water Commissioners of City of Norwich vs. Johnson, 86 Conn., 151; 41 L. R. A., U. S. 1024; 84A 727.
Same vs. Palum, 86 Conn., 151; 84A 736.

To say that such proceedure is not due process of law is to challenge the manner in which the judges constituting the court to which the controversy is now being submitted, are selected. The plaintiffs voted directly for the county judge who appointed the appraisers. The plaintiffs voted indirectly for the president who has the appointing power as to federal judges.

The plaintiffs were given notice of the time the appraisers would meet and qualify under the law and view the land. Representatives of the district and the plaintiffs were with appraisers on the first day. Somehow, not made clear, the plaintiffs met with the appraisers on a second day and went over the ground together, without notice to the district or to any of its representatives.

We have said notice of the application for the appointment was not necessary. Plaintiffs cite Wilber vs. Reed, 84 Neb., 767, as holding otherwise. It does not so hold. The ground as stated by the court is not "notice of the application for appointment," but, is "want of notice of the appointment of the second set of appraisers and of the time and place at which they were to meet and appraise the plaintiffs' property." (See opinion, pages 768, 769-774). No case is cited holding that either party to such a proceeding had a right to

be heard as to the selection of those who should constitute the tribunal before whom the matter should be submitted. It would be as reasonable to require that the president should give to litigants a hearing before appointing the judge who should decide their pending cases.

The plaintiffs complain of the manner in which the appraisers of the right of way for the ditch were appointed, but call attention to nothing erroneous or prejudicial to their rights or interests. The most their criticism amounts to is condemnation of the enactment. The state courts have never had their attention challenged or directed to the alleged error or defect even inferentially by the plaintiffs, and had the question been raised, it is only a construction of an act of the state legislature fixing the course of procedure, and has been approved by the state court of last resort and presents no federal question. Under it the plaintiffs had their day in court before the appraisers and their right of appeal from the findings by that tribunal. However, no case cited by the plaintiffs or quoted from contains even an inference that the defendants ought to have notified the plaintiffs or either of them of the intent to apply for the appointment of appraisers. The defendants had nothing to do or to say as to whom the county judge would select as appraisers, neither should the plaintiffs. In any event, the plaintiffs made no objection before the county judge to any person appointed or to the manner of his appointment, although they had the right, and it was their duty so to do, if they had objection to what had been done.

F. E. & M. V. R. Company vs. Mattheis, 39 Neb., 98, 101-2.

On page 70 of the supplement there is reference to the case of State ex rel. Farmer vs. Grand Island & W. C. R. Co., 31 Neb., 209. The effect of this ruling of the state court is passed by with the declaration, "that a railroad company, being a quasi-public corporation, may, when authority is given by statute, condemn a right of way for its track * * * * *, in which case the only remedy of the land owner is by appeal

from the award of damages, but that rule does not apply here." No reason is given why a different rule applies. The statement is incorrect as the Nebraska Supreme Court has held that the land owner may raise such questions if he desired. No land owner could be prevented from raising the very question suggested.

F. E. & M. V. R. Co. vs. Mattheis, Supra.

While in the opinion in State ex rel. Farmer vs. Grand Island & W. C. R. Co. (Supra), it is said the statute does not require notice of the time of the appraisement, the statute now does require notice (See Sec. 10529, Cobbeys Ann. Stat.; Sec. 2041, Comp. Stat.; Sec. 5952, Rev. Stat.), and the required notice was given. (Ex. 45, Pr. Tr., pp. 80-83, and Ex. 45, as printed alone in Supplement to Pr. Tr., in pp. 1-10).

## LOT 5 OF O'NEILL'S LAND.

The defendants *do seriously contend* that they condemned a right of way through said Lot 5, and that the report of the appraisers fixed a sum which covered *all damages* that plaintiff, O'Neill, suffered with reference to Lot 5 wherever its location may be or whatever its extent.

The plaintiffs must conceed, and if they do not, the record establishes the fact that there was a sum fixed for damages to Lot 5. There could not be two separate amounts of damages fixed for Lot 5. O'Neill had notice of what was done and took no appeal, hence the amount so fixed is final and conclusive.

O'Neill owns no land north of the lake. That was an issue in this case and the court found against O'Neill; that fact so found concludes the plaintiff O'Neill. The state courts did not hold that "Lot 5" of the plaintiff Henry W. O'Neill could be perpetually overflowed. He offered no competent proof of title to any such land; "Lot 5" does not extend north or east of the Jackson Lake. It is one of the tracts of land specifically described in the petition for condemnation. (Exhibit 39, Bill of Exceptions, Vol. 3, p. 156, pr. tr. pp. 71, 72-3); in the notice (Exhibit 45, Bill of Exceptions, Vol 3, p. --, pr. tr. pp. 80, 82), and the Report of the Appraisers (Exhibit

47, Bill of Exceptions. Vol. 3, p ---, pr. tr. pp. 83, 84.) In the latter $100.00 is fixed as the amount awarded to him as compensation for the land taken and as damages to what remained.

This award covers all damage incidental to that particular tract.

It is nowhere conceded by the defendants and was not conceded by the Nebraska court that Lot 5 would be flooded by the water from the proposed ditch. (See plaintiffs' brief, p. 101.) This statement is unfounded and without basis in fact.

Lot 5, referred to, was partially cut away by the Missouri River and Henry W. O'Neill owns that on the south side of the lake. The land across the lake is owned and occupied by other persons strangers to this action. The evidence on the trial so showed (Pr. Tr., pp. 113-143) and the court so found. (Pr. Tr., pp. 18 to 20.) The plaintiff accepted an admission of title excluding the land north of the lake. (Pr. Tr. p. 153.) That finding and admission are conclusive here.

Pages 123-5 of the Pr. Tr., containing the evidence of William Renninger, show that there is a high point of land north of Jackson Lake, on which the buildings stand, which has never been washed away and that Mr. Renninger has run rafts down the Missouri River on both sides of that piece of land. This fact is not questioned anywhere in the record in this case. It supports the finding made by the court. It follows from these facts that at some time there has been an evulsion; that the river which ran on the south side of this high point, and through what is now Jackson Lake, ceased to flow on the south side of these points of land and changed and flowed at the north side of this high land. So that there was an evulsion. If there was an evulsion then, under the doctrine laid down in Kinkaid vs. Turgeon, 74 Neb. 580, the owner of the land north of the Missouri River prior to the evulsion owned to the center of the thread of the stream and Harry O'Neill, owner on the south side, owned north to the center of the thread of the stream subject to the public ease-

ment of navigation, and when the river changed its channel the boundary line between the two owners did not change and Harry O'Neill's line was the center of the thread of the stream as it then ran or the middle of Jackson Lake as it now is.

There is no government map in existence which will show the lakes, the Missouri River and O'Neill's land as they appear on the blue print map between pages 24 and 25 of plaintiffs' brief as claimed in the "supplement,' page 8.

That the court may have before it an approximately correct map of Dakota County we have bound here a map of Dakota County, sectionalized, showing the drainage district, the line of the proposed ditch, the district, Jackson or Cut-Off Lake, the original government meander of the Missouri river near the lake and outlet of the ditch and the land of the plaintiffs. The highways are not shown, but if they are material they will be found clearly marked on Exhibit 36, Vol. 3, B. of Ex.

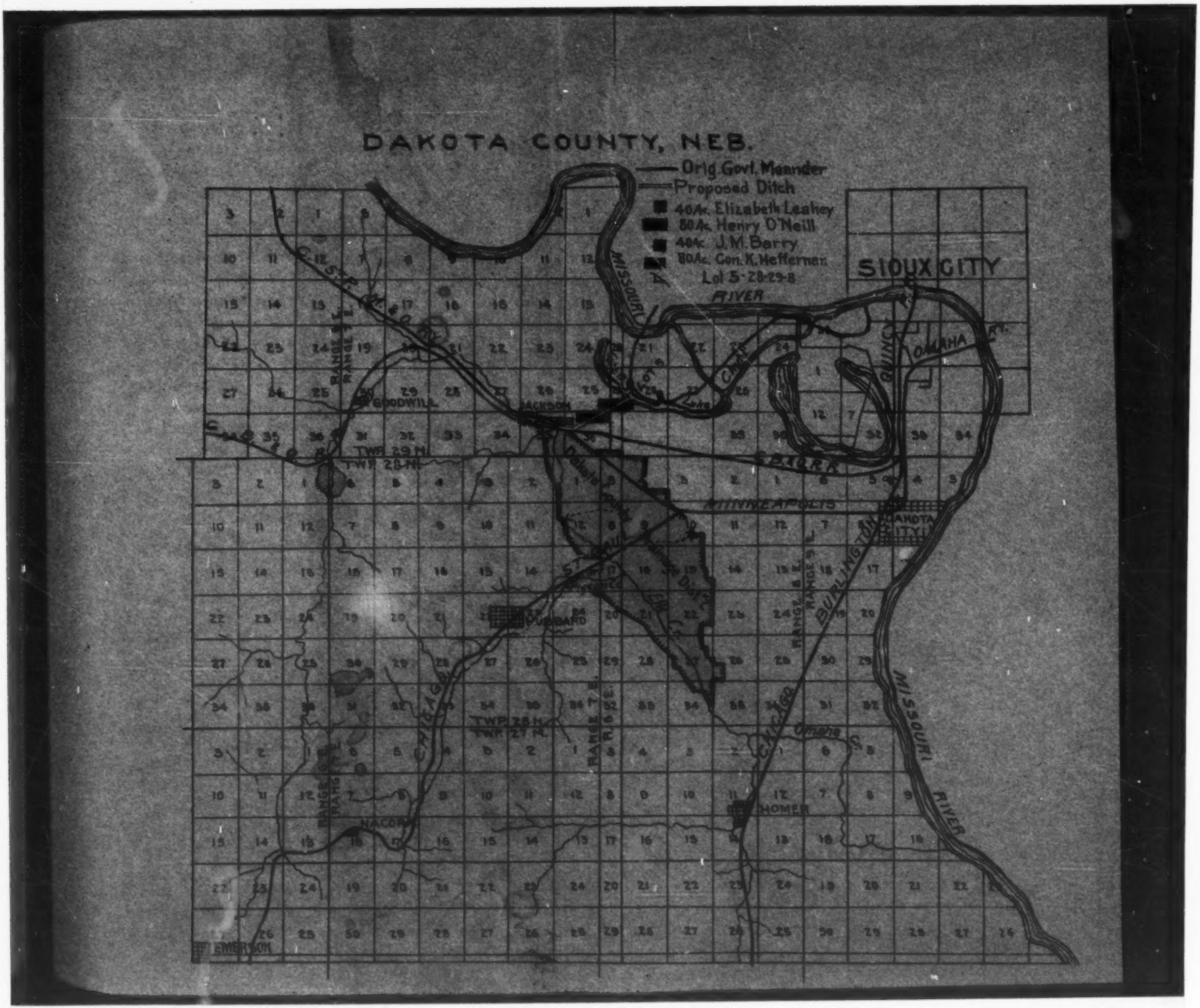
## THE DAMAGES ARE PAID.

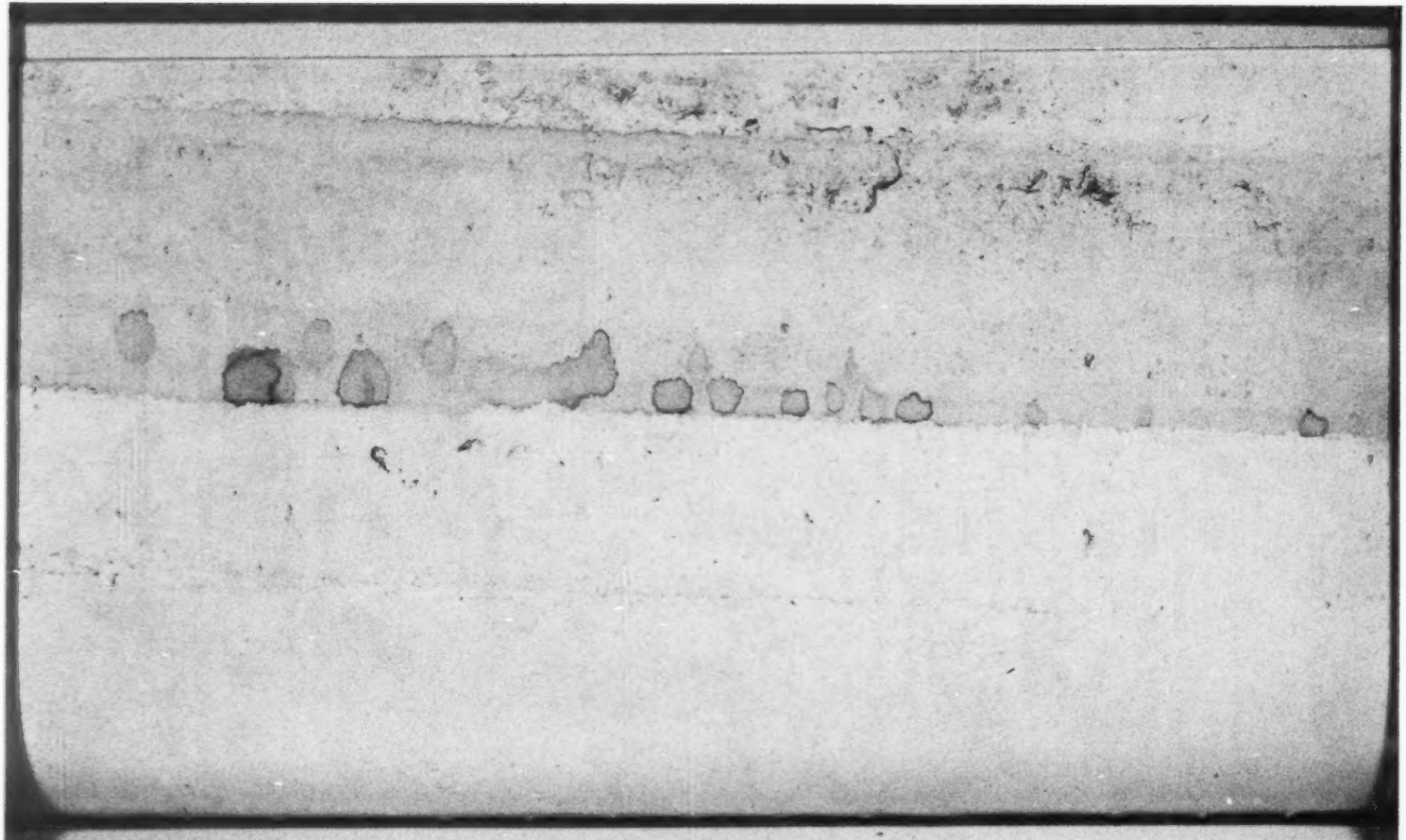
On page 102 of plaintiffs' brief it is asserted that the record does not show the damages have been paid. If so, why did plaintiffs not set that fact forth as one of the grounds for the injunction. No such allegation is made. If for any reason it is an issue in the case it was found against the plaintiffs. The decree in this case permits entry upon the land only when the damages have been paid. (Pr. Tr., p. 122.)

The following stipulation was made during the trial:

"That the defendants will, unless restrained, construct a ditch as shown in Exhibits 36 and 37, except as to the land of Elizabeth Leahy, and as to that land they will make no such attempt until they shall have acquired it either by contract or proper proceeding, but the defendants do not claim to have any right to enter upon any of the land until they shall have paid to the county judge, or the parties, the amounts awarded in the condemnation proceedings." (See Pr. Tr., p 113.)

The plaintiffs knew of the terms of the decree and stipu-


DAKOTA COUNTY, NEB.
Orig. Govt. Meander
Proposed Ditch
40Ac. Elizabeth Leahey
80Ac. Henry O'Neill
40Ac. J.M. Barry
80Ac. Con. K. Heffernan
Lot 5-28-29-8
SIOUX CITY
MISSOURI RIVER
OMAHA R.
GOODWILL
JACKSON
TWP. 29 N.
TWP. 28 N.
TWP. 27 N.
RANGE 7 E.
RANGE 8 E.
RANGE 9 E.
RANGE 10 E.
MINNEAPOLIS
DAKOTA CITY
HUBBARD
HOMER
HACKER
EMERSON
CHICAGO
BURLINGTON
Omaha
MISSOURI RIVER



lation when preparing their argument.

In any event this question is not a Federal question and it was not raised in the state court, hence it presents no question for review here.

## LINE OF LOCATION.

The description of the line of the ditch in the petition for condemnation of the right of way is a part of the record. The printed transcript sets forth but a portion of the descriptions of the line across the different tracts of land. As all of the evidence on this question is not preserved in the printed transcript, if there is a question as to its sufficiency this court must presume it was sufficient. But as it is a question of fact and proceedure found against the plaintiffs by the trial court and that finding sustained by the Supreme Court of Nebraska, that finding is conclusive as to that question here. Nevertheless, should the court decide to go into the question it will be found that:

*The Line of the Ditch is Located Accurately and Correctly and Was Marked on the Ground and Can Be Definitely Located By Any Person.*

The surveyors marked the line of the ditch when the survey was made by stakes. (Ev. Wit. Nelson B. of Ex., pp. 304-6, 418-420.)

The stakes were there when drainage board went over this route. (Vol. 2, B. of Ex., p. 306. Pr. Tr., p. 139.)

These stakes were seen by Towl. (Ev. Wit. Towl B. of Ex., pp. 177-181, 316-318-414-418.) By Daly; by Leamer. (Vol. 2, Bill of Ex., pp. 316-318, 416-418.) (Bill of Ex., Vol. 2, pp. 415-416. Pr. Tr., pp. 123, 140, 141, 153, 154.)

This shows there was a post on the road at Jackson, and this was pointed out to the apprsiaers. (B. of Ex., pp. 384-391.) There was a small tree or bush which marked the line of the ditch. (B. of Ex., Vol. 2, p. 417), which also was called on the attention of the appraisers. (Bill of Ex., Vol. 2, pp. 398-399. Pr. Tr., p. 150.)

It was asked if a stake was set at the initial point of the

ditch. The initial point of the ditch is the intersection of Honey Creek and Elk Creek, and a stake there was and is an impossibility. (Bill of Ex., Vol. 2, p. 385.) The point of intersection is, however, definitely fixed as north of the railroad right of way of the C., B. & Q. R. R. The intersection of Honey Creek and Elk Creek is a physical fact so definitely located that although the witness Wooley could not tell whether the ditch was north or south of the railroad (Bill of Ex., Vol. 1, pp. 101-3), he did fix the intersection north of the railroad. (See Ex. 48.) The initial point of the ditch being fixed by the intersection of the creeks north of the C., B. & Q. R. R., the line of the ditch follows it to the C., St. P., M. & O. R. R., where it crosses the latter at or near the south line of Jackson, and Jackson is all north of the C., B. & Q. railroad track. These are fixed facts or points and this brings us to the only turn or curve in the ditch. From this point the line of the ditch is straight through open country and almost all of it through cultivated land.

This turning point is fixed definitely and certainly by the property taken. The fact that Lot 12, Block 4, Jackson, is taken, fixes beyond doubt that the ditch has made its curve or at least has started to make the curve. The fact that it touches Lot 29, Block 3, in Pacific Townsite Company's First Addition to Jackson, and does not touch Lot 28 in the same block, fixes the north line of that ditch at that point with reasonable certainty.

The fact that the right of way takes part of Lot 3 in and does not take Lot 2 in the said Block 3, again fixes the north line at the point where it passed out of said block.

The fact that it does not touch Block 6, taken in connection with the above facts fixes both north and south line, as width of street and their location, width and length of lots and their location are fixed points and facts which of necessity determine the lines of the ditch at this point.

The facts that Lots 17 and 8 in Block 4, in said addition are not taken again fix the north and south lines of the ditch through that block with reasonable accuracy. The post marked on the Jackson road, which is the center line of the

ditch, will fix the line and with the lots we already have in First Addition to Jackson gives the location and direction of the ditch.

Go, however, to the line between the northeast quarter of the northeast quarter of Section 36, and the southeast quarter of the southeast quarter of Section 25, in Township Twenty-nine 29), Range Seven (7), and again you have a point fixing the center line of the ditch. Not only the center line of the ditch is fixed at the center of the line dividing these two tracts, but out of each of these pieces of land is taken the same width of right of way and the same amount of land, 3.5 acres, and the only possible place where said right of way could run is over the center of the line dividing these two forties. This point was pointed out to the appraisers. (Vol. 2, Bill of Ex., pp. 387, 388, 398, 399, 415-417). Next we come to the small tree or bush on the section line between Sections 28 and 29, in Township Twenty-nine (29), Range Eight (8). It was also pointed out to the appraisers. (Vol. 2, Bill of Ex., pp. 398, 399, 415-417).

*The Assignment that the Line of the Ditch was not Distinctly Marked and that no Attempt to settle with Plaintiffs was made have been Decided against the Plaintiffs Both as to the Facts and to the Law and Present No Federal Questions nor Were they Raised in the State Court as Such.*

Assignments of error are based upon an alleged failure of the defendants, by their survey to properly and definitely locate the line of the ditch; and a failure of endeavor to come to an agreement with the plaintiffs for the value of the right of way. Both of these matters relate to the procedure under the state statute. It is a construction of a state statute by the courts of the state. The finding of fact in both instances as to whether the line was marked or the settlement attempted is against the plaintiffs. The trial court by its findings determined the fact of the location of the line as being sufficiently definite, (O'Neill et al. vs. Leamer et al., 93 Neb., 790-1, Pr. Tr., pp. 155-9), that it was a matter which must of necessity have been raised before the county judge and that, there-

fore, in this case it was and is a collateral attack on that proceedure for that which was but a mere irregularity. (O'Neill et al. vs. Leamer et al., 93 Neb., 791, Pr. Tr., pp. 155-9).

The same things are true of an alleged failure to come to an agreement with the plaintiffs as to the value of the land taken and the damage suffered. (O'Neill et al. vs. Leamer et al., 93 Neb., 789; Pr. Tr., pp. 155-9).

The trial court having found against the plaintiffs both as to the facts and the course of procedure, it was presented with great detail to the Supreme Court of the State of Nebraska and the trial court was in all things sustained. For four reasons then no federal question is presented by either of these assignments so far as they relate to the location of the line or the course of procedure.

1. It being a question of fact and having been found in favor of the defendants that finding of facts is conclusive upon this court. (See authorities hereafter cited).

2. It being a matter of procedure as provided by the statute of the state, the interpretation of the state courts govern. (See authorities hereafter cited).

If the decision turned on the construction of the statute and not its validity, there is no federal question.

> Grand Gulf Railroad & Banking Company vs. Marshall, 53 U. S. (12 How.) 165; 13 L. Ed., 938, and other authorities heretofor cited.

3. It having been a matter which could have been presented to the county judge, the attack here made is a collateral one and so long as jurisdiction appears in the original procedure attacked, neither the state court nor this court can review it in a collateral proceeding. (See authorities hereafter cited).

4. Neither of the alleged errors were presented or claimed in the state courts to be in violation of any provision of the Constitution of the United States or any amendment thereof.

In order to bring a state case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and

decided in the court below.

Crowell vs. Randall, 35 U. S. (10 Pet.), 368; 9 L. Ed., 458.

Choteau vs. Marguerite, 37 U. S. (12 Pet.), 507; 9 L. Ed., 1174.

Coms vs. Gallagher, 40 U. S. (15 Pet.), 18; 10 L. Ed., 645.

Commercial Bank vs. Buckingham's Ex'rs., 46 U. S. (5 How.), 317; 12 L. Ed., 938.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

Maxwell vs. Newbold, 59 U. S. (18 How.), 511; 15 L. Ed., 506.

Hoyt vs. Sheldon, 66 U. S. (1 Black), 518; 17 L. Ed., 65.

Taylor vs. Morton, 67 U. S. (2 Black), 481; 17 L. Ed., 277.

The Victory, 73 U. S. (6 Wall), 382; 18 L. Ed., 848.

Gibson vs. Choteau, 75 U. S. (14 Wall), 5; 20 L. Ed., 875.

Detroit City Ry. Co. vs. Guthard, 114 U. S., 133; 5 Sup. Ct., 811; 29 L. Ed., 116.

Kansas Endowment Ass'n vs. State of Kansas, 120 U. S., 103; 7 Sup. Ct., 499; 30 L. Ed., 593, and other authorities cited hereafter.

## FAILURE TO TAKE ELIZABETH LEAHEY LAND.

Under assignment 19, error is alleged because of failure to take the land of Elizabeth Leahey and the taking of the land of Henry W. O'Neill and thereby perpetually submerging it. An examination of the line of the proposed ditch will disclose that the land of Elizabeth Leahey lies between that of Henry W. O'Neill and the place from which the water is to be taken so that until a right is secured through the land of Elizabeth Leahey it will be impossible to place a drop of water on any portion of the land of the plaintiff, Henry W. O'Neill. The land of Elizabeth Leahey is in the Southeast Quarter of the Southeast Quarter of Section Twenty-five (25), Township

Twenty-nine (29), Range Eight (8). The waters will be taken from Section Thirty-five (35), Township Twenty-nine (29), Range Seven (7), and will empty into Jackson Lake at a point in the Southwest Quarter of Section Twenty-eight (28), Township Twenty-nine (29), Range Eight (8). The lowest point in the ditch, bank or grade will be near the west line of Section Thirty-six (36), Township Twenty-nine (29), Range Seven (7), hence if the district were inclined to excavate the ditch in every place but in Elizabeth Leahey's land, in Section Twenty-five (25) the water would never reach Henry W. O'Neill or Jackson Lake, but would of necessity, when it would have filled the ditch, flow south over the land included within the district.

It was established on the trial that even the low land north of the lake would be submerged but to a slight extent even in times of floods in Elk Creek and practically all of this land north of the lake was flooded when the Missouri river was at an ordinary high stage.

Be the facts as they may, so far as this case is concerned the findings of the state courts on disputed facts were against the plaintiffs and in this court these findings will be respected. (See authorities hereinafter cited).

The construction by a state court of the law of the state as authorizing the court to try and determine in a condemnation proceeding, an adverse claim of the plaintiff therein, to an interest in the property sought, to be condemned, is conclusive on the Supreme Court of the United States on a writ of error to the court.

Hooker vs. City of Los Angeles, 188 U. S., 314; 47 L. Ed., 488; 63 L. R. A., 471.

On pages 104-117 of plaintiffs' brief is a dissertation on "due process of law" general in terms. Nowhere is shown that anything was done or attempted that does not fall within the limitations placed by this court in defining due process of law. (See authorities hereafter cited.)

## FACTS AS TO PERSONS JOINING IN THE ORGANIZATION.

Over 61 persons of full age petitioned for the formation of the district and counting the nine who filed a consent to the formation of the district there were 70 praying for the district. Forty-nine owners of the real estate did file objections to the organization.

The guardian ad litum of 12 minors filed objections for them. Subsequent proceedings show six of them favorable to the organization and the other six are heirs to less than one acre of land—Murray heirs.

The 61 petitioners for the organization were the owners of 4,235.64 acres; the 49 who objected owned less than half that amount. Five of these, Henry Ostmeyer, Matilda Sides, A. O. Sides, I. W. Fisher and Jacob F. Leamer, withdrew from these objections.

Seventy-nine real estate owners did not refuse and no record so shows. The act requires that the petition shall state who do and who do not join in the organization or the petition for the organization of the district. Many of the owners were non-residents, some were indifferent and all who were not active for the organization or were minors are described in the petition for the organization as "does not join in the organization."

There were 70 persons who did not join in the organization. Three of these were corporations, two railroads and Dakota County, who could not take the initiative in forming this corporation and are counted in the 70.

Barnesvs. Minor, 80 Neb., 189, 192-3.

Nine, Alice E. Sides, Jacob A. Sides (Pr. Tr., p. 37), Sylvester Polly, Elizabeth Polly (Pr. Tr., p. 36), John Cullen, Joseph Cullen (Pr. Tr., p. 35), John F. Heffernan, Alice Heffernan and Joseph W. Heffernan (Pr. Tr., pp. 34 and 35), before the first day of district court filed their written consent to the formation of the district and are counted with those who do not join.

Thirteen were minors who are counted with those who did

not join. Of these minors all their guardians and mothers who were joint owners were favorable except the six Murray children, who own one acre. Hanora Howard, guardian of John P. Howard, Ella B. Maloney, guardian of the Maloney minors; Thos. E. Heffernan, administrator representing Mabel Heffernan, minor, were favorable to the ditch. This makes 25 of the 70 who were described as not joining in the organization who either did in fact join or else were laboring under legal disability so that they could take no affirmative action and were counted against the organization of the district. This makes 45 who were either passive or else against the district. Take now the 49 who filed objection and deduct the five who withdrew from the objection—signed a repetition, and there remain 44 who are the ones owning less than one-third of the land.

But the real sentiment on the question is shown in the minutes of the first meeting of land owners when all voted for the election of officers. At this election the votes in favor of the candidates favorable to the improvement ran from 5483 to 4583, while votes for those who opposed the improvement ran from 1028 to 160 (See page 5, Ex. 28, Vol. 3, B. of Ex., page 86). (For abstract of minutes see Pr. Tr., pages 62-64).

It is stated on page 23 of plaintiffs' brief that no provision was made for carting away the dirt to be excavated from the ditch. That is true. It is to be placed within the 200 foot strip for which pay was included in the damages awarded in condemnation proceedings, and will operate as a levee to protect the plaintiffs' land from any possible overflow. The cross-section or profile of the ditch in evidence shows this.

## SUFFICIENCY OF DAMAGES AWARDED.

It is claimed that no damages were included in the appraisement for damages to the land not taken. No reason for such a statement appears. It is not the fact. Plaintiff O'Neill alleges his land is worth $100.00 per acre (Par. 1, Pet. Pr. Tr., 1). Ten and ten-hundredths acres were taken and he was allowed $3,979.00 damages. (Ex. 47, Pr. Tr., p. 84). This

allows him $390.00 per acre for land that he only could allege when he started this suit had been worth $100.00. Plaintiff Heffernan alleged his land was worth $150.00 per acre. (Par. 1, Pet. Pr. Tr., p 2). Nine and twenty-four hundredths were taken. He was allowed $3,848.00 (Ex. 47, Pr. Tr., p. 84), or over $400.00 per acre. Yet plaintiffs claim they only were paid for land taken. However, their remedy was by appeal, if the assessment was too low, and failure to appeal is a waiver of any error in the appraisement. If, however, it was not included in the award they have their action for damages. This question was not raised in the state court. It presents no federal question. In fact, taking O'Neill's land at the highest value he would fix the land taken was worth $1,010.00 and this allows him $2,869.00 as damages to the land not taken. Heffernan adopting his own price was entitled to $1,386.00 for land actually taken, or $2,462.00 for damages to land not taken.

Complaint is made that no judgment was entered upon the award of the appraisers. No such issue was presented in court. Nor was any evidence offered touching that question. It is a matter of procedure under a state statute and does not present a federal question.

## (E)

## COLLATERAL ATTACK.

If the district for any reason was not authorized to exercise the power of eminent domain it could have been presented by the plaintiffs to the county judge in condemnation proceedings. If the statute were unconstitutional or if there were any irregularities in the proceeding to organize the district the plaintiffs could have presented them to the county judge. If there were any irregularities in the condemnation proceedings such objection as want of notice of the application for the appointment of appraisers, objection to any appraiser, failure to attempt to agree with the plaintiffs, the amount of land alleged to be taken out of Lot 5, the manner in which the line of the ditch was marked and any other ques-

tion pertinent to the condemnation could then have been raised.

F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 98, 101-2.

The plaintiffs were served with notice (Ex. 45, Supplement to Pr. Tr., pp. 1-10). They appeared before the appraisers and were heard. Appraiser H. C. Hansen was called as a witness by the plaintiffs and testifies that the appraisers were there two days on one of which none of the defendants or their representatives were along and when the plaintiffs were with them (Pr. Tr., pp. 150-151). Plaintiff O'Neill as a witness swears he went over the land with the appraisers (Pr. Tr., p. 151). Plaintiff Heffernan testifies he was before the appraisers. (Pr. Tr., p. 152. His initials are incorrectly given as "A. E." and should be "C. K."). Appraiser Beacom testifies both plaintiffs were there when the viewing occurred. (Pr. Tr., p. 149). Having appeared before the board, participated in the hearing, they have had their day in court and an opportunity to raise any question pertinent to the right to condemn their real estate, they cannot be heard now.

## COLLATERAL ATTACK OF CORPORATE EXISTENCE.

The validity of the organization of a drainage district cannot be attacked in a collateral proceeding.

10 A. E. Ency. of L. & E., 233-4; 223-4 and cases cited.

7 Ency. Pl. & Pr., 209.

Keigwin vs. Drainage Com'rs., 5 N. E., 575, 577.

Tucker vs. People, 156 Ill., 108; 40 N. E. R., 451.

Morrell vs Union Drainage Dist. No. 1, 118 Ill., 139; 8 N. E. R., 675.

Osborn vs. People, 103 Ill., 224.

Perkins vs. Haywood, 31 N. E. R., 670.

Swamp Lake Dist. 150 vs. Sidner, 98 Cal., 51; 32 Pac., 866.

Newby & White vs. Bd. of Drainage Commissioners, 163 N. C., 24; 79 S. E., 266.

Owen vs. Heffernan, 103 Cal., 506; 37 Pac., 514, 777.

Reclamation Dist. No. 125 vs. Gray, 95 Cal., 601; 30 Pac., 779.

Gray vs. People, 58 N. E. R., 1000; 188 Ill., 416.

But when the objections made in a collateral proceeding are mere irregularities or errors which do not effect the jurisdiction of the tribunal or body creating or making the order creating the corporation, they cannot be considered and are not material, and every presumption is indulged in favor of the validity of the proceedings.

Reclamation Dist. No. 124 vs. Gray, 95 Cal., 601; 30 Pac., 779.

People vs. Hager, 52 Cal., 171.

Osborn vs. People, 103 Ill., 224.

Blake vs. People, 109 Ill., 504.

Riebling vs. People, 145 Ill., 120; 33 N. E., 1090.

Featherston vs. Small, 77 Ind., 143.

Simonton vs. Hays, 88 Ind., 70.

B. & O. C. R. Co. vs. North, 103 Ind., 486; 3 N. E. 144.

Deegan vs. State, 108 Ind., 155; 9 N. E., 148.

P. C. C. & St. L. Ry. Co. vs. Machler, 158 Ind., 159; 63 N. E., 210.

Argos vs. Barthand, 80 Ind., 63.

Jackson vs. Dyer, 104 Ind., 516; 3 N. E., 863.

McMullen vs. State, 105 Ind., 334; 4 N. E., 903.

St. L. I. M. & S. Ry. Co. vs. Dudgeon, 64 Ark., 108; 40 S, W., 786.

Oliver vs. Monona County, 117 Ia., 43; 90 N. W., 510.

Griffith vs. Pence, 9 Kan., 253; 59 P., 677.

Kelly vs. Dolan, 67 N. J. L., 90; 50 A., 453.

Wood vs. Wilson, 4 Houst., 94.

Gillison vs. Cressman, 100 Mich., 591; 59 N. W., 321.

Eaton vs. St. Charles County, 8 Mo. App.,. 177.

Injunction is not the proper proceeding to try the legality or validity of a corporation.

Osborn vs. Village of Oakland, 49 Neb., 340.

And although such corporation may have been irregularly organized its acts done under color of authority are not in-

valid.

Omaha vs. South Omaha, 31 Neb., 378.

Its authority must be respected until its dissolution by the state on a judgment of ouster.

Miller vs. Perris Irrigation Dist., 85 Fed., 693.

A drainage district not properly organized is still a de facto corporation whose existence cannot be attacked collaterally by one outside the district.

People vs. Dyer, 69 N. E. R., 72; 205 Ill., 575.

## COLLATERAL ATTACK ON CONDEMNATION PROCEEDINGS.

A judgment of condemnation of land for public purposes, rendered by a competent tribunal, is not open to collateral impeachment.

Secombe vs. M. & St. P. R. Co., 90 U. S. (23 Wall), 108.

Huling vs. K. V. Ry & Imp. Co., 130 U. S., 559.

Goodrich vs. City of Detroit, 184 U. S., 432.

A judgment rendered by a competent court charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. So HELD of a judgment condemning lands for uses of a railway company.

Secombe vs. Milwaukee & St. P. R. Co., 90 U. S. (23 Wall), 108; 23 L. Ed., 67.

A decision of a state court in a condemnation proceeding is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby or property taken without just compensation, when there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States or that any ruling involved a decision against a right set up under that instrument.

Hooker vs. City of Los Angeles, 188 U. S., 314; 47 L.

Ed., 487.

The question was never raised in the condemnation proceeding at all. It was not raised in the state court in this proceeding.

In a suit to enjoin the taking of land you cannot question the irregularities in the condemnation proceedings.

F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 98.

Dettman vs. Pittenger, 89 Neb., 825.

The supreme court has no jurisdiction of an error to a state court in condemnation proceedings, on the ground that the condemnation statute is repugnant to the Fourteenth Amendment in that it fails to provide for notice, when the highest state court has already decided that the statute does require notice.

Baltimore Traction Co. vs. Baltimore Belt R. Co., 151 U. S., 137; 14 Sup. Ct., 294; 38 L. Ed., 102.

The decisions of the highest court of a state on questions of procedure in condemnation proceedings, or as to alleged conflicts between the statute authorizing them and the state constitution, are controlling on the federal courts.

Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; 17 S. Ct., 718.

It is stated on page 113 of the plaintiffs' brief that the supreme court of Nebraska has not correctly stated that law of Nebraska as to the right of the plaintiffs if there is injury to the lands other than that taken. The supreme court ought to know its own decision as well as plaintiffs and with the court's statements of the law defendants are satisfied. But we cite in support of that heretofore unquestioned rule as stated by the court in its opinion the following cases:

R. V. R. Co. vs. Fellers, 16 Neb., 169.

Chr. R. I. & P. R Co vs O'Neill, 58 Neb., 239, 241.

Drainage District No. 1 vs. Richardson Co., 86 Neb., 355.

C. K. & N. R. Co. vs. Hazels, 26 Neb., 364, 368, 370.

A. & N. R. Co. vs. Boerner, 34 Neb., 240.

Bronson vs. Albion Tel. Co., 67 Neb., 111, 116.

City of Omaha vs. Flood, 57 Neb., 124.

Cline vs. Stock, 71 Neb., 80, 81.

Again on page 114 of plaintiffs' brief the plaintiffs dispute with the supreme court as to the law of our state, with reference to the power or authority of the county court or county judge to correct error or irregularities in the condemnation proceedings. We quote from the opinion in the case of F. E. & M. V. R. Co. vs. Mattheis, 39 Neb., 98, the matter quoted being found on page 102.

"Without doubt the county judge is authorized to exercise the same control over the warrant or commission to the appraisers as over any other process issued by him. If the allegations of the petition are indefinite, an amendment may be allowed and if there is no authority for the issuing of the writ, it may be quashed and set aside upon the motion of one adversely interested; and although the writ of certiorari has been abolished in this state, the district court may still compel the proceedings of an inferior tribunal to be certified up for review."

Hence it is apparent that the plaintiffs might have raised before the county judge any questions either as to the right of the district to exercise the right of eminent domain or as to irregularities in the proceeding.

## CORPORATIONS DE FACTO AND THE RIGHT OF EMINENT DOMAIN.

The plaintiffs urge that a defacto corporation cannot exercise the right of eminent domain.

The defendants have urged that the existence of this corporation, Drainage District No. 2 of Dakota County, Nebraska, can only be tested by an action quo warranto instituted by the state. That in any event they must have raised the objection or defense in the proceeding before the county judge.

The question as to whether or not a defacto corporation may exercise the right or power of eminent domain is wide of the issues in this case. The district is a duly organized public corporation under the laws of the state of Nebraska,

but the defendants will briefly present a few authorities bearing on the proposition.

In condemnation proceedings the states of Missouri, Ohio and New York hold that a corporation de jure must be established before the right may be exercised.

In Arkansas, Illinois, Kansas, North Carolina, Texas and California it is held that it is only necessary to establish a corporation de facto.

5 Ency. Ev., 166, and cases cited.

Thomas vs. St. L. B. & S. R. Co., 164 Ill., 634; 46 N. E., 8, 9.

McCauley vs. C. C. & I. C. R. Co., 83 Ill., 348.

Chicago & Western R. R. Co. vs. Heidenrich, 254 Ill., 231; 98 N. E., 567; Ann. Cas. 1913C, 266, note 271.

W. & P. R. Co. vs. Cashie & C. R. Lumber Co., 114 N. C., 690; 19 S. E., 646.

Neimeyor vs Little Rock J. R. Co., 43 Ark., 111.

P. T. Cable Co. vs. Oregon S. L. R. Co., 23 Utah, 474; 65 P., 735; 90 Am. St. R., 705.

Roaring Springs Townsite Co. vs. Paduah Telephone Co., 164 S. W. (Tex.), 50.

Reisner vs. Strong, 24 Kan., 297, 301; 7 R. C. L., 69.

A decree of court in a former action as to the existence of a corporation is conclusive and admissable as proof.

Rialto Irr. Dist. vs. Brandon, 103 Cal., 384; 37 Pac., 848.

But in any action when the corporate existence is only collaterally in issue the burden of proof is satisfied by proof of a corporation de facto.

Schloss vs. Montgomery, 87 Ala., 411; 6 So., 360; 13 Am. St. Rep., 51.

Lake Side Ditch Co. vs. Crane, 80 Cal., 181, 22 Pac., 76.

Duggan vs. Colo. Mtg. & Inv. Co., 11 Colo., 113; 17 Pac., 105.

Cozzurs vs. Chi. Hyd. P. B. Co., 166 Ill., 213; 46 N. E., 788.

Tipton Fire Co. vs. Barnheisel, 92 Ind., 88.
Finnegan vs. Noerenberg, 52 Minn. 239, 53 N. W. 1150; 38 A. S. Rep. 552, 18 L. R. A. 778.
In re Gibbs Estate, 157 Pa. St. 59, 27 Atl. 383; 22 L. R. A., 276.
Loomis vs. Wainright, 21 Vt., 520.
Reynolds vs. Meyers, 51 Vt., 444.
Stanford L. Co. vs. Steidle, 28 Wash. 27, 68 Pac. 178.
Cane vs. Borgham, 39 Me., 35.
Penobscot Boom Corp. vs. Lamson, 16 Me. 224, 33 A. Dec. 656.
L. & R. P. Co. vs. Suisheimer, 46 Md. 315, 24 Am. Rep. 522.
Barrett vs. Mead, 10 Allen 337, 6 Am. Dec. 129.
Worcester Med. Inst. vs. Harding, 11 Cush., 285.
Prov. Sav. Invt. vs. Barnham, 128 Mass., 458.
Henderson vs. Miss. N. R. R., A Smed. & M., 314.

The special authority to bring about drainage for a public purpose may be conferred on any person or body.

New Iberia vs. New Iberia, etc. Drainage Dist., 106 La. Ann. 651, 31 So. 305.
Bryant vs. Robbins, 70 Wis. 258, 35 N. W. 545.
People vs. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.
Westport Stone Co. vs. Thomas, 91 N. E. R., 406.

## QUESTIONS NOT FEDERAL.

1. Whether the Peabody Act violates any provision of the state constitution. (Assgts. 8, 9, 10, 11, 23 and 24).

2. Whether or not the state courts were correct in holding that the defendants had complied with the state laws. (Assgts. 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 28, 29, 31, 32, 33).

3. Whether the intent or purpose of the defendants is a public one.

4. Whether or not there are other courses of procedure in Nebraska by which drainage may be effected or secured.

5. Whether the line of the ditch is properly marked.

## ADDENDA.

While this brief was in the binder's hands Annotat-
Cases 1915C was issued from the press and as cov-
ng a number of the points in this case that of Mitt-
n vs. Farmer et. al. and the note appended thereto
nstructive and pertinent to a number of the propo-
ions for consideration in this case and we hereby
llenge the attention of the court thereto.

Mittman vs. Farmer et. al.
162 Iowa, 364; Ann. Cas. 1915C, 1 note on pp. 9 to 29.

As to Legislative power to create see note on pp. 9 to

As to drainage district being a public corporation see
te on pp. 13 to 14.

For a review of Ferbache vs. Drainage Dist. No. 5
e note on pp. 21 to 22.

As to collateral attack on the organization of a
ainage district see note on pp. 26 to 27.

See also:

Barnes et. al. vs. Missouri Valley Construction Co., 257 Mo. 175; Ann. Cas. 1915C, 34 to 40.

Drainage Commissioners vs. East Carolina Home & Farm Association, 165 N. C. 697; Ann. Cas. 1915 C, 40-43.

6. Whether Elizabeth Leahey's land was condemned.

7. Whether land in Lot 5 owned by Harry O'Neill will be flooded or that he has been compensated by the award already made.

8. Whether or not the amounts awarded by the appraisers have been paid by the defendants.

Whether the Peabody Act—the act under which the district was organized—violates any provision of the state constitution does not present a federal question.

The assignments (8, 9, 10, 11, 23 and 24), that the act of the legislature of Nebraska under which this drainage district was organized is in violation of the constitution of Nebraska, when the supreme court of that state has held it constitutional, present no federal question.

Layton vs. State of Missouri, 187 U. S., 356; 47 L. Ed., 214; 23 S. Ct., 137.

Medberry vs. Ohio, 65 U. S. (How.), 413; 16 L. Ed., 739.

Porter vs. Foley, 65 U. S. (How.), 415; 16 L. Ed., 740.

Congdon vs. Goodman, 67 U. S. (2 Black), 574; 17 L. Ed., 257.

Withers vs. Buckley, 61 U. S. (20 How.), 84; 15 L. Ed., 816.

Jackson vs. Lamphire, 28 U. S. (3 Pet.), 280; 7. L. Ed., 679.

Barbier vs. Connolly, 113 U. S., 27; 28 L. Ed., 923; 5. S. Ct., 357.

Leeper vs. Texas, 139 U. S., 462; 35 L. Ed., 225; 11 Sup. Ct., 577.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112; 41 L. Ed., 369; 17 Sup. Ct., 56.

And such decision when made by the state court is conclusive on the federal courts.

Rasmussen vs. State of Idaho, 181 U. S., 198; 45 L. Ed., 820; 21 S. Ct., 594.

Mobile Transportation Co. vs. City of Mobile, 187 U. S., 479; 47 L. Ed., 266; 23 S. Ct., 170.

Carstairs vs. Cochran, 193 U. S., 10; 48 L. Ed., 596;

24 S. Ct., 318.

Brown vs. State of New Jersey, 175 U. S., 172; 44 L. Ed., 119; 20 S. Ct., 77.

Merchants & Manufacturers' Bank vs. Commonwealth of Pennsylvania, 167 U. S., 461; 42 L. Ed., 236; 17 S. Ct., 829.

Sanford vs. Poe, 165 U. S., 194; 41 L. Ed., 683; 17 S. Ct., 305.

McCain vs. City of Des Moines, 174 U. S., 168; 42 L. Ed., 936.

Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S., 685; 41 L. Ed., 1165; 17 S. Ct., 718.

N. Y. & N. E. R. Co. vs. Town of Bristol, 151 U. S., 556; 38 L. Ed., 269; 14 S. Ct., 437.

Hallinger vs. Davis, 146 U. S., 314; 36 L. Ed., 986; 13 S. Ct., 105.

In order that the question raised shall be a federal question it must be that the state statute violates the Constitution of the United States.

Satterlee vs. Matthewson, 26 U. S. (2 Pet.), 380; 7 L. Ed., 457.

This requires this court to hold that such assignments as base the alleged error on the unconstitutionality of the act under the provision of the state constitution present no federal question.

II.

Whether the state courts were correct in holding that the defendants had complied with the state law in organizing the district or in condemning real estate presents no federal question.

In plaintiffs' assignments of error numbered 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 31, 32 and 33 and inferentially in others the fact of the regularity of the organization of the drainage district or the condemnation procedure is questioned.

In a contested case before the district court of Dakota

County Nebraska, the findings required by the statute under which the proceedings were had, were made and no appeal taken. Evidence is preserved in the bill of exceptions in this case sufficient to support the findings if the degree of proof required were 'beyond a reasonable doubt.' The records of the court covering that proceeding are in evidence in this action. Hence, should the court so desire, it or any of its members may be satisfied as to the regularity of those proceedings.

The district court before whom the proceedings to organize the drainage district were had also tried this case. After the plaintiffs had proven all that they could that court found against them. The record so made has been affirmed in all things by the highest court of Nebraska. We then have the constitutionality of the statute under the state constitution affirmed and the course of procedure to organize the district, as it interprets that act of the legislature, approved by the highest court in the state.

It follows that those assignments (23, 24, 27, 32 and 33) which relate to or attack the regularity of the proceeding by which the drainage district was organized present no federal question unless it be because of something other than a failure to comply with the statutory requirement in organizing. The same is true as to those assignments that relate to the condemnation procedure.

Ordinarily the provisions of the Fourteenth Constitutional Amendment, relating to due process of law, does not apply where the legislature of a state has performed its duties by providing for proceedings which answer the constitutional requirement, and where the fault is either with the court or officers.

Storti vs. Commonwealth of Massachusetts, 183 U. S., 138; 46 L. Ed., 120; 22 S. Ct., 72.

The question of the constitutionality having been determined in the state court, whether the provisions of the statute have been complied with in a particular case or proceeding is a mixed question of law and fact, and the finding of the state court in favor of the defendants is conclusive

upon this court as to the construction of the law and the existence of the fact.

A decision of the highest court of the state, made on the settled pre-existing rules of general jurisprudence of the state, cannot be brought to the Supreme Court of the United States under Judiciary Act., Sec. 25.

Bank of West Tennessee vs. Citizens' Bank of Louisiana, 80 U. S. (14 Wall), 9; 20 L. Ed., 514.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

French vs. Taylor, 199 U. S., 274; 50 L. Ed., 189; 26 S. Ct., 76.

The Supreme Court of the United States has no jurisdiction, under Section 25 of the Judiciary Act, of a case brought up from the highest court of a state, on the record of which it appears that the decision of the state court turned upon the construction, and not upon the validity, of the statute of a state.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

State courts have sole jurisdiction, in cases which turn entirely on the validity or interpretation of state laws, and this court has no appellate power over their judgments.

Congdon vs. Goodman, 6, U. S. (2 Black), 574; 17 L. Ed., 257.

Decisions of a state court of last resort construing a state statute will be followed by United States courts.

Tullis vs. Lake Erie & W. R. Co., 175 U. S., 348; 44 L. Ed., 192; 20 S. Ct., 136.

Missouri, K. & T. Ry. Co. vs. McCann, 174 U. S., 580; 43 L. Ed., 1093; 19 S. Ct., 755.

Yazoo & M. V. R. Co. vs. Adams, 181 U. S., 580; 45 L. Ed., 1011; 21 S. Ct., 729.

The construction of a statute by the highest court of the state forms a rule of decision for the federal court.

McKeen vs. Delancy's Lessee, 9 U. S. (5 Cranch), 22; 3. L. Ed., 25.

Polk vs. Wendal, 13 U. S. (9 Cranch), 87; 3 L. Ed., 665.

Thatcher vs. Powell, 19 U. S. (6 Wheat.), 119; 5 L. Ed., 221.

Elmendorph vs. Taylor, 23 U. S. (10 Wheat.), 152; 6 L. Ed., 289.

McCormick vs. Sullivan, 23 U. S. (10 Wheat.), 192; 6 L. Ed., 300.

Bell vs. Morrison, 26 U. S. (1 Pet.), 351; 7. L. Ed., 174.

D'Wolf vs. Rabaud, 26 U. S. (1 Pet.), 476; 7 L. Ed., 227.

Davis vs. Mason, 26 U. S. (1 Pet.), 503; 7 L. Ed., 239.

Waring vs. Jackson, 26 U. S. (1 Pet.), 570; 7 L. Ed., 266.

Fullerton vs. Bank of United States, 26 U. S. (1 Pet.), 604; 7 L. Ed., 280.

Ross vs. Barland, 26 U. S. (1 Pet.), 655; 7 L. Ed., 302.

Gardner vs. Collins, 27 U. S. (2 Pet.), 58; 7 L. Ed., 347.

Beach vs. Viles, 27 U. S. (2 Pet.), 675; 7 L. Ed., 559.

McCluny vs. Silliman, 28 U. S. (3 Pet.), 270; 7 L. Ed., 676.

United States vs. Morrison, 29 U. S. (4 Pet.), 124; 7 L. Ed., 804.

Henderson vs. Griffin, 30 U. S. (5 Pet.), 151; 8 L. Ed., 79.

Hinde vs. Vattier's Lessee, 30 U. S. (5 Pet.), 398; 8 L. Ed., 168.

Ross vs. McLung, 31 U. S. (6 Pet.), 283; 8 L. Ed., 400.

Green vs. Neal's Lessee, 31 U. S. (6 Pet.), 291; 8 L. Ed., 402.

Brashear vs. West, 32 U. S. (7 Pet.), 608; 8 L. Ed., 801.

Harpending vs. Dutch Church, 41 U. S. (16 Pet.), 455; 10 L. Ed., 1029.

Kinney vs. Clark, 43 U. S. (2 How.), 76; 11 *L. Ed.*, 185.

Phalen vs. Virginia, 49 U. S. (8 How.), 163; 12 L. Ed., 1030.

Sumner vs. Hicks, 67 U. S. (2 Black), 532; 17 L. Ed., 355.

Leffingwell vs. Warren, 67 U. S. (2 Black), 599; 17 L. Ed., 261.

City of Richmond vs. Smith, 82 U. S. (15 Wall.), 429, 438; 21 L. Ed., 200.

Carroll County Sup'rs vs. United States, 85 U. S. (18 Wall.), 71; 21 L. Ed., 771.

Aicardi vs. Alabama, 86 U. S. (19 Wall.), 635; 22 L. Ed., 215.

State Railroad Tax Cases, 92 U. S., 575; 23 L. Ed., 663.

Meister vs. Moore, 96 U. S., 76; 24 L. Ed., 826.

Davie vs. Briggs, 97 U. S., 628; 24 L. Ed., 1086.

Leeper vs. State of Texas, 139 U. S., 462; 35 L. Ed., 225; 11 Sup. Ct., 577.

New York, L. E. & W. R. Co. vs. Pennsylvania, 158 U. S., 431; 39 L. Ed., 1043; 15 Sup. Ct., 896.

The established rule is that the federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself.

Olcott vs. Fond du Lac County, Fed. Cas. No. 10,479; 2 Bliss, 368, 4 Am. Law T. Rep. U. S. Cts., 47.

The state has full control over procedure in its courts subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution.

Maxwell vs. Dow, 176 U. S., 581, 685; 44 L. Ed., 597, 606.

When the question is whether, under the constitution and laws of a state, a company is legally organized as a corporation, the decision of the supreme court of the state settling

the question in the affirmative will be accepted as conclusive.

Secombe vs. Milwaukee & St. P. R. Co., 90 U. S. (23 Wall.), 108; 23 L. Ed., 67.

Mooney vs Humphrey, 12 Fed., 612.

Fitzgerald vs. Missouri Pac. Ry. Co., 45 Fed., 812.

It follows that no federal question is presented by either the construction of the statute or in the finding as to whether or not its provisions have been complied with in the proceeding resulting in the organization of the drainage district.

III.

It is not a question for investigation by federal courts as to what the intent or purpose of the defendants was in the organization of Drainage District No. 2 of Dakota County, Nebraska. The question is whether or not under the statute being investigated and which is now attacked by the plaintiffs, private property may be taken for a private purpose. If the plaintiffs have properly raised the question as to whether or not this statute violates the Fourteenth Amendment to the Constitution of the United States then his court will examine that statute as to whether or not it does provide due process of law; as to whether or not the purpose of the statute is a public one and whether or not it will come within the inhibition of the Fourteenth Amendment to the Constitution. If the question has been raised in the state court this court will go far enough to determine whether or not the purpose of the court is public or private. If the statute stands the test then this court will not inquire as to whether or not the law has been properly applied.

As has already been said the state court has full control over the procedure in its courts subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution.

Maxwell vs. Dow, 176 U. S., 581, 605; 44 L. Ed., 597, 606.

## IV.

It is not a federal question that there are other courses of procedure provided by the state of Nebraska by which drainage may be effected or secured.

The Supreme Court of the United States does not concern itself with questions as to which is the better course of procedure. The only thing that it will investigate is as we have already said, does the course pursued furnish due process of law.

## V., VI. and VIII.

It is not a question for investigation by federal courts as to whether or not the line of the ditch is properly marked, or whether Elizabeth Leahey's land was condemned, or whether the amounts awarded by the appraisers have been paid to the defendants. All are matters of procedure or an interpretation of the state law, and the Supreme Court of the United States has no appellate power over the judgments of state courts thereon. (See authorities heretofore cited under this head).

The Supreme Court of the State of Nebraska so far as the questions have been raised has decided that the line of the ditch is properly marked in conformity with the state statute; that it is unnecessary to condemn Elizabeth Leahey's land in order that you may have the right to condemn Henry O'Neill's land; that whatever the requirement is with reference to the payment of compensation for the lands condemned that these defendants so far as is necessary complied with it and as a matter of fact the state court held that only when the compensation had been paid could entry be made.

## VII.

Whether or not Harry O'Neill's land in Lot 5 will be flooded is a question of fact. Whether or not he has been compensated is a question of fact. So far as these facts are material they have been found against the plaintiffs by the state courts and they present no federal question. The findings so made are binding on this court.

## THE FEDERAL QUESTION PRESENTED HERE NOT RAISED IN STATE COURT OR WAIVED.

There is another reason why but one question can be considered in this court. Under the decisions and rulings of the Supreme Court of the State of Nebraska, under its statute with reference to appeals heretofore quoted, each and every error relied upon must be presented in the Supreme Court of the State of Nebraska in their assignment of errors set forth at large in their brief or else it will be deemed to have been waived. In other words, errors not specifically set out in the appellant's brief as required by the statute of Nebraska and argued will not be reviewed by the Supreme Court of the State of Nebraska because it will be held that such errors, whatever they may have been, have been waived by the appellants.

Packard vs. DeVoe, 94 Neb., 740-742.
Waxham vs. Fink, 86 Neb., 180.
First National Bank vs. Hedgecock, 87 Neb., 220.
Northwest Thresher Co. vs. Eddyville State Bank, 80 Neb., 377.
Mandell vs. Weldon, 59 Neb., 699.
Adams Smith Co. vs. Haywood, 52 Neb., 80.
Johnson vs. Gulick, 40 Neb., 817.
Madsen vs. State, 44 Neb., 631.
Gulick vs. Webb, 41 Neb., 711.

Not only so but an attack on the constitutionality of a statute will not be considered on appeal where the objection to the act and the section of the constitution violated are not pointed out in appellant's brief.

Armstrong vs. Bates, 94 Neb., 462, 463.
Boyes vs. Summers, 46 Neb., 308, 309-310.

Issues tendered by the pleadings, but not determined by the trial court, and not discussed in the briefs on appeal will not be considered by the Nebraska Supreme Court.

Bankers Union of the World vs. Landis, 75 Neb., 625, 627.
Opp vs. Smith, 96 Neb., 224.

As has been pointed out procedure in a state court so long as it gives to the litigants an opportunity to be heard is binding in this court as to the procedure had in the state court. Upon the application of this principle to the present case the only possible federal question in the record saved by the plaintiffs is that presented by the third assignment of error which is that the statute under which the district was organized is in violation of the Fourteenth Amendment of the Constitution of the United States. We quote in full from pages 16 and 17 of the plaintiffs' brief in the Supreme Court of Nebraska, all that is said with reference to that or any federal question:

"THE PLAINTIFFS AND APPELLANTS, HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, ASSIGN AS ERROR THE JUDGMENT OF THE DISTRICT COURT ON HOLDING DRAINAGE DISTRICT NO. 2 TO BE A CORPORATION, AS IN VIOLATION OF SECTION 1 OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

"If you will turn to Exhibit 1, Volume 3, of the record, which is a copy of the petition and articles of association which were filed in the office of the district clerk of Dakota County, Nebraska, for the incorporation of Drainage District No. 2, you will see that those persons who did not join in the application, including the minors, represent 4,158 of the 7,000 acres of the so-called district. The preponderance of acreage was decidedly against the establishment of the district, but notwithstanding that fact, the district court of Dakota County entered a judgment declaring the corporate existence of the district, and all subsequent proceedings of so-called Drainage District No. 2 are based thereon.

"Our contention is that Section 1 of the Fourteenth Amendment to the Constitution of the United States protects all persons in the freedom of contract, which means not only the right to contract, but to refuse to contract; and that it

is not within the power of the legislature under any guise or in any form, to authorize the district court to enter a decree over their protest forcing them to consent to the incorporation of their property in a drainage district and to bear the burden and liability of such an organization. A clearer form of peonage or slavery could scarcely be imagined. And here again we are forcibly reminded that safety to persons and property is found only in a conscientious adherence to fundamental principles. This contention is so highly elementary that we cite no authority in its support."

This of course relates only to the provision of the statute with reference to the organization of the corporation. As we have already pointed out earlier in this argument the manner or method of the organization of a corporation under a state statute does not present a federal question. (See authorities heretofore cited).

Plaintiffs are also met with another provision with reference to the procedure in the state courts on appeal. The Supreme Court of the State of Nebraska will not consider any question upon which the trial court has not already ruled or to which its attention has not been challenged.

Bankers Union of the World vs. Landis, 75 Neb., 625, 627.

Opp vs. Smith, 96 Neb., 224.

Nelson vs. Farmland Security Co., 79 N. W., 161; 58 Neb., 604.

Post vs. Smith, 95 N. W., 500; 1 Neb. (Unof.), 94.

Wells vs. Fetzer, 89 N. W., 596; 2 Neb. (Unof.), 551.

Hanscom vs. Meyer, 78 N. W., 367; 57 Neb., 786; 73 Am. St. Rep., 544.

All questions as to the constitutionality of any statute raised in the trial court except that the statute under which the district was organized was unconstitutional as violating the Fourteenth Amendment were waived in the State Supreme Court.

## WERE ANY FEDERAL QUESTIONS PROPERLY RAISED.

As has been pointed out in the statement of the case, the only attempt to raise a federal question in the trial court is found in paragraphs 15 and 16 of the petition and paragraph 3 of the reply.

Paragraph 15 does not allege that the Peabody Act, or the procedure *had under it* is in violation of the Fourteenth Amendment of the Constitution of the United States. So far as it relates to the Federal Constitution it is as follows:

"Said defendants are not the officers or agents of a corporation * * * * * and have no lawful authority or right whatever * * * * * under the Constitution of the United States of America to invade the plaintiffs' said land to construct a ditch * * * * * and that to permit them to do so would be a violation of * * * * * Section 1, Article 14, of the Constitution of the United States of America which provides" etc.

At best these allegations are but conclusions and not statements of fact. Whatever force may be given to them they have been waived.

Under the Nebraska Code of procedure it is necessary that the appellants assign in their brief the questions relied upon and to be presented. No petition in error or assignment of error in any other form is necessary or recognized. It is also necessary to present to the trial court for its decision the question upon which the assignment of error is based. It will be noted that in the 15th paragraph of the plaintiffs' petition the allegation is that the defendants are not officers or agents of a corporation and have no lawful authority or right whatever to invade the plaintiffs' said land and to construct a ditch. It is not alleged in any place that the Peabody Act under which the district was organized is in violation of the Constitution of the United States or of the Fourteenth Amendment and the only way in which such an issue can be considered as presented is by an inference that they are not the officers because the Peabody Act is unconstitu-

tional. The only issue tendered is that the defendants are not the officers of the district. Such allegation infers that there is such a district but that the defendants are not its officers. The assignment in the Supreme Court of the State of Nebraska is that to hold Drainage District No. 2 to be a corporation is to violate Section 1 of the Fourteenth Amendment to the Constitution of the United States. There is no Article 14 to the Constitution of the United States, so that so far as the assignment contained in paragraph 15 is concerned it has only the effect of a general declaration that the defendants have no right under the Constitution of the United States to invade the plaintiffs' said land. Such an assignment is not sufficient to charge even by implication that the Peabody Act is unconstitutional or a violation of any provision of the Constitution of the United States or any amendment thereto.

In paragraph 16 the only question raised is whether the purpose or object of the defendants is private. There is nothing urged with reference to whether or not, when the drainage of the lands in question shall have been accomplished, a public purpose has been carried into effect or whether or not the legal intent or effect of drainage is a public one. Whatever the character of the issue thus tendered and which was made by the general and specific denial in defendants' answer, the fact so far as it was presented was decided in favor of the defendants. No evidence whatever is preserved in the record by the plaintiffs which would support any finding upholding the allegation made in paragraph 16 so far as it is intended to be and is a question of fact. The evidence that was offered on that issue was the evidence offered by the defendants and the finding by the court is a finding in favor of the defendants which this court will respect.

But to return to the proposition now being presented, it does not present a federal question.

Paragraph 3 of the reply does allege that Sections 14, 15, 16 and 17 of the act under consideration are unconstitutional and void and under the provisions * * * * * of Section 1 of the Fourteenth Amendment to the Constitution of the United States in so far as it makes the plaintiffs or any other

person make an application in writing for compensation for damages. Section 15 is said to be unconstitutional because it confers or attempts to confer upon the Board of Supervisors the power to determine whether the requisite notices have been given and because the four sections are an attempt to deprive citizens of the United States of their property without due process of law. In this statement the plaintiffs are acting upon a false assumption as to what the provisions of these sections are. Neither of Sections 14, 15, 16 or 17 in any way effect the plaintiffs except as it relates to the adoption of the line over which the drainage may be carried. There is nothing within either of the sections which requires the plaintiffs or any other owner of land through which the line of drainage runs to take any action whatsoever. It relates only to those who have been made parties either petitioners for or objectors to the organization of the drainage district in the original proceeding which resulted in its organization.

In the State Supreme Court this question is not presented, hence it is waived. (See authorities hereinbefore cited.)

In the argument presented by the plaintiffs in this court they apparently have abandoned the attack on Sections 14, 15, 16 and 17 of the act. This being so whatever questions they have raised are those that are raised under paragraphs 15 and 16 quoted above. It is therefore insisted by the defendants that they have presented no question here for review.

The supreme court has no jurisdiction to re-examine the judgment of a state court, unless the record shows, affirmatively or by fair implication, that a federal question necessary for the determination of the cause is involved.

Williams vs. Norris, 25 U. S. (12 Wheat.), 117; 6 L. Ed., 571.

Willson vs. Blackbird Creek Marsh Co., 27 U. S. (2 Pet.), 245; 7 L. Ed., 412.

Satterlee vs. Matthewson, 27 U. S. (2 Pet.), 380; 7 L. Ed., 458.

Mills vs. Brown, 41 U. S. (16 Pet.), 525; 10 L. Ed., 1055.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169.

Furman vs. Nichol, 75 U. S. (8 Wall.), 44; 19 L. Ed. 370.

Brown vs. Atwell, 92 U. S., 327; 23 L. Ed., 511.

Citizens' Bank vs. Board of Liquidation, 98 U. S., 140; 25 L. Ed., 114.

Boughton vs. Exchange Bank, 104 U. S., 427; 26 L. Ed., 765.

This court has no jurisdiction to re-examine the judgment of a state court where a federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

Hurley vs. Street, 81 U. S. (14 Wall.), 85; 20 L. Ed., 786.

McManus vs. O'Sullivan, 91 U. S., 578; 23 L. Ed., 390.

Bolling vs. Lersher, 91 U. S., 594; 23 L. Ed., 366.

In order to bring a case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and decided in the court below.

Crowell vs. Randell, 35 U. S. (10 Pet.), 368; 9 L. Ed., 458.

Choteau vs. Marguerite, 37 U. S. (12 Pet.), 507; 9 L. Ed., 1174.

Coms vs. Gallagher, 40 U. S. (15 Pet.), 18; 10 L. Ed., 645.

Commercial Bank vs. Buckingham's Ex'rs, 46 U. S. (5 How.), 317; 12 L. Ed., 169.

Grand Gulf Railroad & Banking Co. vs. Marshall, 53 U. S. (12 How.), 165; 13 L. Ed., 938.

Maxwell vs. Newbold, 59 U. S. (18 How.), 511; 15 L. Ed., 506.

Hoyt vs. Shelden, 66 U. S. (1 Black), 518; 17 L. Ed., 65.

Taylor vs. Morton, 67 U. S. (2 Black), 481; 17 L. Ed., 277.

The Victory, 73 U. S. (6 Wall.), 382; 18 L. Ed., 848.

Gibson vs. Chouteau, 75 U. S. (8 Wall.), 314; 19 L. Ed., 317.

Cockroft vs. Vose, 81 U. S. (14 Wall.), 5; 20 L. Ed., 875.

Detroit City Ry. Co. vs. Guthard, 114 U. S., 133; 5 Sup. Ct., 811; 29 L. Ed., 118.

Kansas Endowment Ass'n vs. State of Kansas, 120 U. S., 103; 7 Sup. Ct., 490; 30 L. Ed., 593.

The facts giving the supreme court jurisdiction to review the decision of a state court must appear on the record, or be necessarily implied therefrom.

Miller vs. Nicholls, 17 U. S. (4 Wheat.), 311; 4 L. Ed., 578.

Satterlee vs. Matthewson, 27 U. S. (2 Pet.), 380; 7 L. Ed., 458.

Ocean Ins. Co. vs. Polleys, 38 U. S. (13 Pet.), 157; 10 L. Ed., 105.

The Victory, 73 U. S. (16 Wall.), 382; 18 L. Ed., 848.

Gibson vs. Chouteau, 75 U. S. (8 Wall.), 314; 19 L. Ed., 317.

Murray vs. Charleston, 96 U. S., 432; 24 L. Ed., 760.

The United States Supreme Court will not review the judgment of a state court on the ground of a denial by the latter court of a right under a statute of the United States, unless the record shows, either by words or by clear and necessary intendment therefrom, that the right was specifically claimed, or a definite issue as to the possession of the right is distinctly deducible from the record, without any adverse decision of which the judgment could not have been rendered.

Capital Nat. Bank vs. First Nat. Bank, 172 U. S., 425; 43 L. Ed., 502; 19 S. Ct., 202.

In determining whether the United States Supreme Court has jurisdiction, under Section 25 of the Judiciary Act, nothing outside the record certified to the court can be taken into consideration.

Armstrong vs. Athens County Treasurer, 41 U. S. (16 Pet.), 281; 10 L. Ed., 965.

Walker vs. Villvasco, 73 U. S. (6 Wall.), 124; 18 L.

Ed., 853.

The petition for the allowance of a writ of error forms no part of the record of the court below; and this court has no jurisdiction to determine a federal question presented in such petition, but not disclosed by the record sent here from the state court.

Warfield vs. Chaffs, 61 U. S., 690; 23 L. Ed., 383.

A general statement that the judgment violates the Federal Constitution, or the rights of the party thereunder, or that it is without due process of law, will not raise a federal question, even though the judgment be a final one, reviewable by the Federal Supreme Court on writ of error, under Rev. Stat. U. S., Sec. 709, especially where such statement appears only in the specifications of error.

Clarke vs. McDade, 165 U. S., 168; 41 L. Ed., 673; 17 S. Ct., 284.

When the allegation that the suit arises under the Federal Constitution is palpably unfounded, it does not constitute even color for the jurisdiction for the United States Circuit Court.

McCain et al. vs. City of Des Moines, 174 U. S., 168, 181; 43 L. Ed., 936, 941.

Gring vs. Ives, 222 U. S., 365; 56 L. Ed., 235.

Farrell vs. O'Brien, 199 U. S., 89, 100.

Fayerweather vs. Ritch, 195 U. S., 276, 299.

Goodrich vs. Ferris, 214 U. S., 71, 79.

## THE LAND APPROPRIATED UNDER THE CONDEMNATION PROCEEDING IS TAKEN FOR A PUBLIC USE.

The defendants are well aware, that as a issue of fact, the purpose of this particular drainage district is not properly before this court for consideration.

If all the questions have been properly raised in the state court and presented in this court, there may be (1) a question as to the constitutionality of the statute under which the district was organized and (2) a question as to the constitutionality of the statute which provides the proceedure for the condemnation of right of way.

The question of fact as to the actual use to which the plaintiffs' land taken by the dtich right of way shall be put is not here for consideration, as the state will see to it that the land is applied to the purpose for which it was taken.

Upon failure to use it for the purpose to which it has been condemned, it reverts to the original owner. All that the condemnation does is to subject the land to an easement and should the burden of the easement be removed the land ceases to be charged with it. The plaintiffs in their arguments have urged this issue.

The presumption is that the purpose is a public one.

Huck vs. Voght, 110 Ind., 279; 11 N. E., 306.

Hartwell vs. Armstrong, 19 Barb., 166.

McDaniel vs. Columbus, 91 Ga., 462; 17 S. E., 1011.

The plaintiffs indulge in repeated statements that the purpose of the district is private, referring apparently not to the purpose as shown or indicated by the statute, but to the intent of the defendants or to the purpose of this particular district.

In different forms this runs throughout plaintiffs' arguments, as if in reiteration the plaintiffs would carry conviction. If the fact were material, if it has been presented in the trial court, the finding in the state court concludes the plaintiffs and is against them. It is waived in that it is not presented to or raised in the Supreme Court of Nebraska and in this case is not a Federal question.

As a matter of fact, in February, 1908, before the proceeding to organize the district was instituted, the Supreme Court of Nebraska had declared in State vs. Hansen, 80 Neb. 724, 742-745, that it was necessary under the act of 1907—the Knowles Act—that a proposed ditch improvement must be for the public welfare and that there must be a finding to that effect. This rule so declared in State vs. Hansen, Supra, has been applied by the state courts to all ditch legislation and ditch organization in the State of Nebraska. This interpretation of the Knowles Act was before the court when the hearing was had on the petition to organize this district.

The trial court, when it was considering the petition praying for the organization of the district, also had before it section 3 of the Act, which makes two reasons sufficient to defeat the organization of a drainage district, and they are: First, "their objection * * * * * *why such drainage district should not be organized and declared a public corporation of this state,*" and, second, "and why their land will not be benefitted by drainage." These two reasons or grounds for objection answer every objection that has been urged by plaintiffs to the purpose of this district. If the ditch is not for a public purpose or benefit, then under the first objection as to why "such drainage district should not be organized and declared a public corporation" those objecting to the organization could have defeated the organization by showing that its purpose was not for the public welfare. The trial court in each case must find that it is a proper case for which to create a public corporation. Many persons did object to the organization of the district; they did charge that the law was unconstitutional because it did not require a finding that the proposed improvement would be conducive to the public health, convenience and welfare, but those objecting did not even allege that it would not be conducive to the public health, convenience and welfare. (See Ex. 10, Pr. Tr., pp. 43 to 45.) And the court, after hearing the evidence, did find that "it will be a public utility and will be conducive to public convenience and welfare." (See Ex. 17, Pr. Tr., pp. 51 and 52, the finding being near top of page 52.) It follows that the court investigated the very objection the plaintiffs are now urging against the district. The finding so made concludes all persons. The record in the present case shows twenty-two miles of highway which might be made passable—made good roads—by drainage, five miles of railroad, all used as post roads, made safe for traffic of the public and its mails. Now, as this is being written, thousands of those acres, some of them up to the very doorway of homes, are flooded and corn and wheat and oats are rotting and the stench from sour and decaying corn and other vegetation will soon threaten the health of not only those in

the district but will become a menace to many outside the district. Since this suit was tried in the district court, the county in which the district is has spent more than $10,000.00 on a portion of the highways within the district in an attempt to make them passable, and at the moment of this writing (August, 1915) you cannot go either north or south or east or west across that tract of land, while on roads on land near there under similar conditions, except that they are freed from flood waters, vehicles of all kinds, from the heavy loaded to the light buggy, roll over smooth dragged dirt roads.

The Act requires that it be for the public use. The court found the district was for the public benefit and the land to be taken for a public use. These plaintiffs never offered evidence to show any other condition or use. To have attempted it would have been to be ridiculous. Scan the record, but nowhere will there be found any intimation that the district was not carrying out a public purpose for the general public or that the proposed improvement would not be for the public health, convenience and welfare. Nearly the entire record as made by the plaintiffs is taken up in an attempt to show the method of drainage adopted would not accomplish the purpose sought and was not proper from an engineering standpoint, but no word is offered as to the purpose. It is shown by the case cited by the plaintiffs, Cheney vs. Dakota County, 22 Neb., 437, that as early as 1885 this territory was recognized by the Board of County Commissioners of Dakota County and the courts of the state as a proper district for drainage and that the owners then so considered it assuming the burden of partail drainage. There is not even in the plaintiffs' petition an allegation that the drainage of this district will not be for the public good. The only allegation that attempts an approach to it is in paragraph 16, and it is so hedged about and so evasive as not to present the issue of the public character or result to be attained. The allegations in paragraph 16 of plaintiffs' petition relate only to the intent or interest of individual defendants and in no place refers to the object of the district as a corpora-

tion or the effect upon the district. The plaintiffs allege the defendants are not officers of the district; that there is no such corporation as Drainage District No. 2 of Dakota County, Nebraska, and that it, the district, "has no public character or function and does not pretend to have any other than that which is private." The latter sentence is the only allegation in the petition which approaches the point in mind. Suppose it is alleged A, B and C are not the officers of School District No. 1; that their purpose is private; that said district has no public character or function and does not protend to have any authority other than that which is strictly private and the intent is to take private property for a private purpose. Such allegation does not mean that the conduct of the public schools is not a public function. There is not from beginning to end of the plaintiffs' pleadings, anywhere an allegation that the reclamation of these lands, the benefits to accrue to the roads and railroads by which the district is traversed and the improvement of sanitary conditions to accrue from the proposed improvement are not clearly within the proper mission of a public corporation, nor is there an allegation that these benefits and improvements will not follow upon the construction of the ditch. Construe the allegations of the petition as you will, no evidence was offered in support of any theory as touching the use except that offered by the defendants. The decree of the court, including the finding that it is for the public health, convenience and welfare, is conclusive as to that issue were it properly here for review.

We will now consider the question as to this particular district from the position assumed by the plaintiffs. Seven thousand acres are involved. Over 140 persons are the owners. Villages are on all sides of the tract, for an agricultural region it is thickly settled and it is within seven miles of Sioux City. There are twenty-two miles of highways traversing it which are, at this writing, and, during this season for perhaps four months, will be impassable except to foot travelers equipped with waders. One line of railway has already been at an expenditure of thousands of dollars to handle

this water and the problem seems even yet unsolved. On the other two lines the track has been washed out several times in recent years and since this action was commenced at least two men have given their lives while attempting to control this water and keep the railroad open. The greater portion of this land can only produce hay because of the wet and swampy conditions which follow the winter, too long continued to permit of cultivated crops. Most of the land planted to crop is always in danger of the water. At this writing (August), there is at least 1,000 acres of cultivated crop that is flooded, and, although all small grain is mature, it will probably be a total loss, as it cannot be harvested, and the corn standing in water under a hot sun will be killed. Take this water away in the manner proposed by the district and all of this land becomes certainly productive in the highest sense. Where water now flows homes will thrive; where vegetation now decays will play happy, healthy children; from the place which now breeds the typhoid germ will float the aroma of flowers; over the roads, now only such in name, will roll all kinds of vehicles without danger of mire, mud or water, and while the land itself will pay for the expense of the improvement it will be paying into the county treasury taxes trebled in amount and to the community an annual income greater than the present value of the land.

While it is not apparent to the defendants what force was intended to be given the statement, "no bonds of the proposed district have been registered or sold and it has no outstanding obligations, there are no intervening rights of third person to cause any hesitancy in applying the constitution to the statute," found on page 82 of the Supplement, it is untrue. It is another of the plaintiffs' statements that is incorrect. There is nothing in the record directly bearing on the facts above referred to. It is, however, evident that the engineer's work has been completed except as to supervising construction; the contracts have been let; bonds in the sum of $84,000.00 are authorized. (See Vol 3, B. of Ex., pp. 91-100, 132-147.) The right of way must have been settled for or this action would have been unnecessary, as two years

have elapsed and if not paid for the right to enter under the condemnation proceeding has lapsed.

Pages 14 to 38 inclusive of the "Supplement" are taken up with what is termed a "skeleton" and alleged reasons why the purpose of the act or the improvement proposed under it is private.

The defendants are unable to see any force to the matter on those pages. The district court who heard the evidence when the district was organized, determined the purpose was a public one, that it would be conducive to the public health, convenience and welfare and the plaintiffs having done the best they could before the same court, could present no evidence of a single fact from which it might be inferred that the purpose of the district is private.

On the hearing when the corporation was to be organized the question to be determined was "why such drainage district should or should not be organized and declared a public corporation," and in determining those questions the purposes and object of the corporation and the character of the proposed improvements are material and controlling. (See Sec. 3 of the Act.)

On page 38 of the "Supplement" the law is criticised because a district created under it is not a school district or a road district, a city or village, a precinct or a county. That is true, but the conclusion that it is not a political subdivision of the state does not follow. If the purpose is one which may be performed by the legislature and the corporation has been created in accordance with law to perform that legislative purpose or duty, it is a political agency or corporation. While it cannot levy taxes for road purposes, neither can school districts. It cannot levy taxes for schools, neither can road districts, towns or cities. Indeed, neither can the school district. In Nebraska, all that any of the political agencies named can do is to recommend or report the amount needed to carry on the work assigned to it. And this district has the authority to do the same. It is true that it is without a magistrate. So are road districts and school districts. It does not run schools, neither do road

districts. It does not run a municipal water plant, neither do school districts or road districts. It does perform a public mission. It will prevent stagnant water on this 7,000-acre tract; it prevents decaying matter thereon, and hence prevents ill health; it provides suitable highways from one of the richest tracts of agricultural land to Sioux City, a market for the products of the lands; it will make certain and stable three lines of railway, each of which is a post-road and two of which have been washed out by the flood it would have prevented since this injunction has been in force. At least two deaths since this suit was started have been the direct result that this ditch would have prevented. (The two latter facts are not in the record in this case.)

The illustrations found on page 42 of the "Supplement" are incorrect in application. If but twenty per cent of the eighty-acre tract is subject to flooding or damage by water only the twenty per cent can be taken into the district and that after it has been shown that it will secure benefit and can only be taxed in proportion to the benefit secured. Thus, to carry out the illustrations, if the cost of the improvement in the supposed case were $1,000.00 and the benefit to the 1,000-acre tract were ninety-nine units and to the twenty-acre overflowed tract belonging to B, D, E and F were .01 unit, then the 1,000-acre tract will pay $9,900.00 and the twenty acres, or the quarter section, belonging to B, C, D, E and F would pay $10.00, which would be a charge only against the twenty acres overflowed. If the 1,000 acres that were benefitted were .999 units and the twenty-acre tract .001 units, the 1,000 acres would pay $999.00 and the twenty acres $1.00.

The second illustration on page 42 of the "Supplement" supposes or assumes that land can be brought into the district which is not damaged by water or which will not be benefited by the proposed improvement, which is incorrect, as the fact that the land could secure no benefit would exclude the land.

On page 44 of the "Supplement" is a question as to how

one outside the district might obtain admission. First, the duty of the engineer to report all the land that should be included or which would be benefitted is clear. Within the limitation of human imperfection it is supposed all to be benefited will be in. Thus far in plaintiffs' case the great objection has been made that you cannot stay out. A new district can always be formed if the need is present. (See Sec. 9.) It is made the duty of the chairman to take the proper steps to incorporate the land to be benefited in the district. Upon failure to act in such a case mandamus would compel the performance of official duty. Or if such owner prefers he may with others organize his own district and use the same outlet.

The discussion on page 45 of the "Supplement" may contain wise suggestions for a drainage regulation, but contains no reason for declaring the purpose of the proposed improvements private. Plaintiffs will look in vain for any public improvement, for which assessments are made against benefited property, to which all of the criticism they now urge against this statute would not have as much or more force and merit.

In the lengthy arguments here presented by the plaintiffs, one of the great lamentations is that the legislative function of creating a corporation has been in the violation of the Constitution placed with the judiciary, yet on page 46 of the "Supplement," when the legislation repeats one of its limitations as to the size of the district, it is urged that the province of the court is invaded, when the fact is that it is only intended to have the court act in such matters as directed by the legislature.

The plaintiffs cite the case of Cheney vs. Dakota County, 22 Neb., 437. In this case, decided in 1887, a finding was made that even at that time the drainage of a large portion of the land included in this district would be conducive to the public health, convenience and welfare. A comparison of the description of the land given in the opinion in this case cited with that in District No. 2 discloses that it includes the same land and that the ditch then constructed is a part

of the improvement now proposed.

The defendants join with the plaintiffs in calling to the attention of this court State vs. Hanson, 80 Neb., 724, et seq. (Supplement, p. 50) and to the fact that the trial court had this declaration before it when this district was organized, and that the principles there enunciated were the criterion by which the court was guided in the present litigation.

The cases cited and quoted from in the "Supplement" on pages 51-65 inclusive, when read, will disclose that the purpose, in each case where the act was held invalid, the corporation without power to act, was plainly a private one.

Plaintiffs' "review of some of the decisions relied upon by the defendants" does not in any way detract from or weaken the principles laid down in the decisions reviewed.

The trial court of Nebraska has found all the facts against the plaintiffs. The Nebraska Supreme Court has approved all those findings. The statutes whose constitutionality have been attacked by the plaintiffs have been sustained by both courts, and unless there is something in the record presented, violating the Constitution of the United States and its Amendments and which was presented to the state courts, the plaintiffs have no standing here. Before passing from the "review" the defendants will call the attention of the court to another of the plaintiffs' inconsistencies. In considering the case C., B. & Q. Ry. Co. vs. Illinois, 200 U. S., 561; 5 L. Ed., 596, its effect is attempted to be avoided by the statements that Illinois has a constitutional provision permitting private drainage districts, but ignores the fact that the district in question was not a private district and ignoring the fact that the ground upon which the principles and doctrines it enunciates is not such amendment. But the plaintiffs cite no case holding that by a constitutional provision the state can avoid the effect of an inhibition of the Federal Constitution.

The following cases clearly indicate a contrary position.

Missouri P. R. Co. vs. Nebraska, 161 U. S., 403; 41 L. Ed., 489.

Smyth vs. Ames, 169 U. S., 525; 42 L. Ed., 842.

King vs. Mullins, 171 U. S., 404; 43 L. Ed., 214.
T. & H. R. Co. vs. Kentucky, 183 U. S., 511; 46 L. Ed., 304.
Bigelow vs. Draper, 6 N. D., 152; 69 N. W., 573.

It follows that if a state cannot by a statute deprive an individual of his property without due process of law, that it could not accomplish that purpose by a constitutional provision, hence the suggestion in no way avoids the effect of the Federal Constitution or its amendments.

It follows that even if there is a provision in the Constitution of Illinois providing for private drainage it cannot authorize the taking of property for a private purpose and escape the effect of the Fourtheenth Amendment as to Due Process of Law.

The defendants cannot see clearly why the use to which the water to flow through the ditch is to be applied is material. The public purpose must in this case be determined by the effect produced by the drainage upon the territory drained, not by the use of the water when it shall once have left the drained territory. It is not material in this case whether when the water reaches the Missouri river it will aid navigation or not. The use of the water is not the purpose of the act. The act proposes to improve health and aid transportation facilities. But when, on page 84 of the "Supplement," the plaintiffs ask a number of questions and request an answer, the answer is ready. Exhibit 35 (3 Vol. B. of Ex., pp. 151-155½) is the report of the engineers of the district and attached to the report, and a part of it is Exhibit 36, the plat of the district showing the highways and the railroads. Thus by aid of these exhibits is shown and not disputed that there are on said land one mile of the C., B. & Q. Ry., over six miles of the Chicago, St. Paul, Minneapolis & Omaha Railway, divided between two lines; all of which are post-roads, and twenty-two miles of highways, which highways as these lines are written are not passable to the ordinary farm conveyance, but are nearly navigable by reason of the flooded condition which would be entirely -

relieved by the construction of the proposed ditch. This is the third time this has occurred since these plaintiffs have secured this injunction. Two lines of the highway furnish a direct route between a large and productive agricultural community and its market and the flooding requires a trip to be made either around the north end of the district or else around the south end to reach the market.

During the time this injunction has been in force, two of the lines of railroad have been washed out within the district. As these lines are written more than a thousand acres of crops, most of it ready to harvest, are under these waters and in a few days the stench from the rotting fodder, straw and immature corn will float over the country to effect its health, and rotten debris, weeds and sour grass will, during the remainder of the season, feed the cemeteries of our community by the typhoid fever route. The records show that these railroads and the county join in the paying for the cost of the proposed improvement. All the land owners will have an interest in the improvement. All the land owners will have an interest in the improvement to be built. The improvement will be held as the property of the district and in exactly the same manner as the county holds, controls and manages highways, or towns and city government holds, controls and manages streets. The lands within the district will be held as are lands within a county, subject to the taxes which the district may lawfully certify to the county clerk to build and construct the improvement and thereafter maintain it. The interest of the public in the lands within the district will not be affected any more than it is affected when a county is organized, a village or city created, or school district or road district established. A quasi municipal corporation or, if you prefer, a governmental corporation with limited powers has been built in the organization of the drainage district.

If the plaintiffs' attorney should go upon the lands included within the district without the consent of the owner, and in such a manner that if the entry were made on any other lands, he would be subject to an action for trespass,

then in the supposed case he would be subject to such action if the entry were made on the lands within the district.

The public, except as it may have the right to insist upon the proper maintenance of the ditch and the payment of the costs of construction and maintenance, will have no greater interest in the lands than it had before 1909, when the district was created. There will be no public use of the land within the district not taken by the ditch, in the sense that it will be taken over by the public. But the lands taken by the district under the power of eminent domain will ever hereafter be used to carry off the water of Elk Creek in the most direct line to the Missouri River—its natural outlet—and in so doing will make healthy the entire district which is now a large part of the time a typhoid breeding swamp, it will make passable and good all the time the public highways across the district which are now impassable, and which for heavy loads are impassable the greater portion of the time; it will make stable and solid the roadbeds of the three railroads running across it and remove the possibility of their being washed out each season one or more times, and incidentally will open healthy homes and profitable farming on a tract of over 7,000 acres, now the most unhealthy place in northeastern Nebraska.

The great wail from the plaintiffs is that this improvement will enhance the value of the lands within the district. This is necessarily so. Upon no other consideration would the large portion of the cost of improvement be taxed or assessed against the land. Just as municipal drainage is taxed to the property owner in certain cases, so is this cost taxed largely to the lands. Just as municipal drainage will increase the value of the property served, so this increases the value of lands in the district.

The act is not void. The improvement is public in its character and the relief it brings. It does not need to rest upon the reclamation of a large tract of land. In any drainage case in Nebraska, the conditions have become such that the drainage of lands under the conditions surrounding this tract is public purpose—for the public good in the sense that

the taking under the power of eminent domain would be justified and any other conclusion or rule is against the principle recognized by all courts.

## CONCLUSION.

There is no error in the record presented here.

The first, second and third assignments of error are general in their nature and refer to nothing specifically.

The fourth, fifth, sixth and eighth assignments of error relate to the organization of Drainage District No. 2 of Dakota County, Nebraska, by an order made in the district court and allege the invalidity of the statute under which the same was organized or created and present no federal question because this court has held that the manner of the organization of corporations is a matter peculiarly within the province of the state legislature and the construction placed by the state courts on state statutes present no question for review in this court.

The seventh assignment of error presents an alleged statement of facts which is not warranted by the record which if correct was never raised in the state court.

The ninth assignment presents an issue of fact as to whether or not the defendants were officers of the district and which issue was found against the plaintiffs. Based thereon is the allegation that it is in violation of the Fourteenth Amendment to the Constitution. This so far as it effects an allegation of a violation of the Constitution is the same as assignments 4, 5, 6 and 8.

The 10th, 12th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th, 28th, 29th, 31st and 32nd present questions relative to the construction and interpretation of the statute of the State of Nebraska by the state court and present no federal question for review in this court.

The 11th assignment of error relates to Sections 14, 15, 16 and 17th of the act in controversy upon an assumption not borne out by the language of those sections, that is, that those

sections provide that there shall not be an appeal from the assessment of benefits when the statute expressly provides there shall be. It was not presented in the State Supreme Court and is waived.

Assignment 13 is based upon a finding of fact as to the character of the body of water known as Jackson Lake and an alleged finding as to the effect of the water upon the land of the plaintiff, O'Neill. So far as the record may show either of these facts they have been found against the plaintiffs and in favor of the defendants. No Bill of Exceptions with reference to such finding is presented here nor is there any evidence pointed out to sustain the contention of the plaintiffs.

Assignment 23 is with reference to the provision relative to voting in the district and is alleged to be in violation of the Fifteenth Amendment. No provision in the amendment is violated by the provisions of the drainage law with reference to voting and it was not raised in either state court.

The 30th assignment of error is with reference to the purpose of the defendants, that is, that their purpose is private and for their own pecuniary purposes. This does not present a federal question. It was not presented in the State Supreme Court and is waived. As has been pointed out it is not what the individual purpose was, but what is the general purpose of the act under which the defendants acted. The finding by the trial court, approved by the supreme court of the state is against the plaintiffs.

The 33rd assignment of error is that the judgment is not supported by the evidence. Nowhere in either of the voluminous arguments presented by the plaintiffs is there any reference to any evidence which would support findings other than those made by the trial court and approved by the state court of the state of Nebraska.

There is no federal question presented. There has been no violation of any provision of the Constitution of the United States or any amendment thereof. There has been no error committed as against either or both of the plaintiffs. This

court has not jurisdiction of the subject matter of this action and the case should be dismissed.

Respectfully submitted,

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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

**October Term, 1913.**

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**Number 23955.**

---

HENRY W. O'NEILL AND CORNELIUS K. HEFFERNAN, PLAINTIFFS IN ERROR,

VS.

JACOB F. LEAMER, JOHN T. DALEY, FRED BARTELS, DAVID GLENN ARMOUR AND CHARLES H. MAXWELL, DEFENDANT IN ERROR.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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## REPLY BRIEF OF PLAINTIFFS IN ERROR.

---

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*Attorneys for Plaintiffs in Error.*

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### STATEMENT.

More than a year ago the defendants filed a motion to "dismiss *and* affirm," evidently intended as a motion to "dismiss *or* affirm," which was properly denied (*Wilson* v. *Bell*, 20 Wall.

201, 22 L. ed. 259) and supported it by a brief to which the plaintiffs replied. Thereafter in regular order the plaintiffs filed a brief and recently the defendants filed a second brief to which this is a reply.

It is deemed unnecessary to again state the question as that was fully done in previous briefs.

The first fifty pages of the defendants' second brief are devoted to a quotation of Nebraska statutes. The statutes quoted in defendants' first and second brief and in the first brief of the plaintiffs as Exhibit "A," a correct compendium of which appears on pages 14 to 28 of our second brief, are the same whether reference be to the Compiled Statutes, Cobbey's Annotated Statutes, the Session Laws, or to the Revised Statutes of 1913. At the time this action arose there were printed in Nebraska not only the biennial session laws but two compilations, one by Mr. Wheeler known as the Compiled Statutes and one by Mr. Cobbey known as Cobbey's Annotated Statutes or the Annotated Statutes; and in 1914 there was printed the Revised Statutes of 1913. So that where we refer to the original session laws as chapter 161 of the Laws of 1905, as amended by chapter 147 of the Laws of 1909, and the respective subdivisions of chapter 19 of the Revised Statutes of 1913, entitled "drains and drainage," we have reference to the same legislative acts that learned counsel for the defendants claim as certain sections of Cobbey's Annotated Statutes. This statement is deemed necessary to clarify the situation and make the citations understood.

Commencing on page 51 and extending to page 57 the defendants devote some attention in their second brief to the question whether the case involves a federal question; and beginning on page 57 and extending to page 70 an attempt is made to show that a federal question is not presented. In doing so, however, counsel do but little more than repeat statements and citations from their first brief.

Commencing on page 70 and extending to page 78, in which will be found a statement of the different methods (pp. 73-78)

of organizing drainage districts in Nebraska, defendaonts review our argument in support of the unconstitutionality of the act involved.

Commencing on page 78 and extending to page 88, counsel present their views as to what constitutes "due process of law"; and beginning on page 88 and extending to page 90 they contend that lot five (5) of Mr. O'Neill's land was properly condemned.

Beginning on page 90 and extending to page 91 is a claim that the damages are paid, which is repudiated by the record and is a misconception of counsel. In this connection, it will be observed that between pages 90 and 91 there is a blue print, but the outline of the alleged district is a misconception as no swamp is located on the official map of Dakota county issued by either state or national authority. But it will be observed that the meander line is located north and east of Jackson lake.

Commencing on page 91 and extending to page 97 is a discussion of the line of location of the district and some inapt authorities are cited to sustain defendants' contention.

Commencing on page 97 and extending to page 99 will be found a statement of the persons who joined and of those who refused to join in the formation of the alleged district; and beginning on page 98 and extending to page 99 is a statement that sufficient damages were awarded.

At this point and commencing on page 99 and extending to page 104, defendants present the doctrine of "collateral attack," "collateral attack on corporate existence" and "collateral attack on condemnation proceedings."

Commencing on page 104 and extending to page 106, defendants discuss the right of a corporation *de facto* to exercise the power of eminent domain.

Commencing on page 106 and extending to page 118 is a discussion of "questions not federal," and beginning on page

118 and extending to page 123 the query is propounded "were any federal questions properly raised."

Commencing on page 123 and extending to page 136, the conclusion of the brief, defendants state that "land appropriated under the condemnation proceedings was taken for a public use" and discuss that question. And from page 136 to page 138 the brief is devoted to a *resume* of conclusions.

It will be observed that all through the defendants' second brief there is a concession that if the use of the property sought to be condemned is not a public but a private use, the statute involved is in violation of the 14th amendment to the federal constitution. But it is claimed that the drainage of the territory sought to be embraced in the alleged district "will be a public utility and will be conducive to the public convenience, health and welfare" and therefore a public use (Record, p. 1, fol. 81).

Defendants, on pages 54 and 55 of their second brief, greatly narrow the discussion by making these concessions:

> An act which authorizes the taking of private property for a private purpose is void.
>
> If the organization is private and if its purpose is private it can not exercise the rights of eminent domain.
>
> That the legislature can not by its action make a private purpose a public one, and that whether the use is a private one or a public one is a judicial question.
>
> That the constitutionality of an act is to be tested by what may lawfully be done under its authority.
>
> A state can not by violating its constitution impart vitality to an act and make it due process of law under the Fourteenth Amendment to the Constitution of the United States.
>
> The decision of a state court as to what is "due process of law" does not bind the federal court where the question as to whether the particular proceeding is due process of law under the Fourteenth Amendment to the Constitution has been presented to the state court.
>
> That no man can be coerced into corporate relations with others in a private or profit sharing corporation.

That land can not be taken under the power of eminent domain unless it is thereafter to be devoted to a public use.

That the state must have a voice in the manner in which the public may avail itself of the use.

If the act is unconstitutional it can be attacked in these proceedings if presented to the state courts, but the act must have been attacked in the state courts upon the same grounds it is attacked in this court.

Omitting from defendants' briefs all encumbering verbiage, doubtful and inapt phrases, counsels' contention may be reduced to two primary propositions:

I.

**HAS THE COURT JURISDICTION OF THIS CASE?**

The defendants claim that it has not, while we contend that the jurisdiction is undoubted. The jurisdiction is fully presented in the light of the adjudged cases in our first brief from page 29 to page 49 and in our second from page 9 to page 11. But as counsel for defendants insist on the point, it may not be out of place to make it clearer if possible.

In reading the petition, which is by no means a work of art and for which probably we owe an apology as it was written in much haste to prevent the commencement of the digging of the ditch, it will be observed that the 12th paragraph (Record, p. 5, fol. 8) contains a statement that the "only alleged charter or authority for existence (of the alleged district) is contained in said petition and said articles of association filed in the office of the clerk of the district court of Dakota county, Nebraska, as aforesaid (that is, the petition and articles of association for the incorporation of the district), and said order of said district court of said county issued under section three, chapter 161 of the laws of the state of Nebraska for the year 1905."

Paragraphs 15 and 16 are as follows (Record, pp. 6-7, fols. 10-11):

15. The plaintiffs aver that the said defendants are not the officers or agents of a corporation or body politic known as Drainage District No. 2 of Dakota county,

Nebraska, and have no lawful authority or right whatever under the constitution of the state of Nebraska and the Constitution of the United States of America to invade the plaintiffs' said land herein described and to construct or to dig any ditch or canal thereon, or to carry the waters from said Elk creek across the same, or empty them into said Jackson lake, and to do anything to the injury thereof, and that to permit them to do so would be a violation of section 21, article 1 of the constitution of the state of Nebraska which provides, that: "The property of no person shall be taken or damaged for public use without just compensation therefor," and of section 1, article 14 of the—United States of America which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

16. The plaintiffs aver that the single object and purpose of the defendants in what they intend and threaten to do as herein alleged, is wholly private and in the exclusive pecuniary interest of the so-called corporators of said alleged Drainage District No. 2 of Dakota county, Nebraska, including the defendants, and that said alleged Drainage District No. 2 of Dakota county, Nebraska, has no public character or function whatever and does not pretend to have any authority other than that which is strictly private, and its alleged incorporation was and is for the exclusive purpose of enabling the defendants and their associates to accomplish in aggregate capacity what the respective individuals thereof could not do, that is, to take the private property of other private citizens including the plaintiffs herein, for strictly private uses and purposes and for their own individual benefit in violation of the constitution of the state of Nebraska and of the Constitution of the United States of America.

A compendium of paragraph 3 of the reply (Record, pp. 15, 16, fols., 25 26), is as follows:

3. And these plaintiffs further replying to said answer aver that sections 14, 15, 16 and 17 of the act of the legislature of the state of Nebraska for the year 1905, entitled, "An Act for the organization and government of drainage district, etc.," approved March 29, 1905, are unconstitutional and void under the provisions * * * of section 1 of the 14th amendment to the Constitution of the

United States of America * * *. And the said sections of said acts are in violation of section 1, of the 14th amendment of the Constitution of the United States of America which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," as said sections of said acts as well as said entire acts abridge the privileges and immunities of the plaintiffs and of each of them, who are and at all times heretofore have been citizens of the United States, and deprive them and each of them of their property without due process of law and deny to them and to each of them the equal protection of the laws.

The 2d, 3d, 7th, 10th and 11 assignments of error in the supreme court of Nebraska (Record, pp. 179, 180, fols. 303-305), are as follows:

2. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the order of the district court adjudicating that so-called drainage district No. 2 was a public corporation clothed with authority to exercise the right of eminent domain and to condemn and take their lands through which to dig a drainage canal.

3. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment of the district court in holding drainage district No. 2 to be a corporation, (and) as (not) in violation of section 1 of the 14th Amendment of the Constitution of the United States.

We insert the words "and" and "not" in parenthesis to supply an elipsis.

7. The plaintiffs and appellants, Henry W. O'Neill and Cornelius K. Heffernan, assign as error the judgment and ruling of the district court holding that the condemnation proceedings were not rendered void by a failure to take and condemn a right of way across the land of * * * and to take and condemn the land of Henry W. O'Neill north of the lake, which will be flooded by the waters of the ditch.

10. Drainage District No. 2, so called, is not and never was a corporation under the laws of Nebraska, and is not

and never was clothed with authority to exercise the right of eminent domain.

11. The district court of Dakota county had no jurisdiction to create a corporation.

And the questions were again presented to the state supreme court in the motion for a rehearing (Record, pp. 159, 160, fols. 263-265) in this language:

2. Because the court declined to consider or determine the second assignment of error.

3. Because the court declined and failed to consider the third assignment of error.

* * *

10. Because the court erred in deciding and determining that Drainage District No. 2, so called, was and is a corporation under the laws of Nebraska, and clothed with authority to exercise the right of eminent domain.

11. Because the court erred in ruling that the so-called Peabody drainage district act is constitutional.

12. Because the court erred in holding that the district court of Dakota county had jurisdiction to create a corporation by judicial order or judgment.

* * *

16. Because the court erred in holding that the alleged condemnation of the plaintiffs' lands was sufficient to authorize the defendants to dig a drainage canal thereon.

* * *

18. Because the court erred in failing and refusing to decide pertinent and vital points presented in the pleadings, in the testimony and in the bill of exceptions and necessary to a proper adjudication of the rights of the plaintiffs and appellants, all of which are fully set forth in the printed argument in support hereof, accompanying this motion.

Thus it will be observed that in the petition and the reply, as well as in the assignment of errors and the motion for a rehearing, when construed together, the validity of the so-called Peabody act (which is chapter 161 of the Laws of 1905 as amended by chapter 147 of the Laws of 1909, the act in question) and the right of the alleged drainage district to condemn and take the land of the plaintiffs under the power of eminent domain, was constantly kept before the district court

of Dakota county and the supreme court of Nebraska and is here presented. Neither of the state courts could have dismissed the plaintiffs' petition and rendered the judgment that was entered without affirming the validity of the act. That the supreme court of Nebraska so understood the case is apparent from its language in *O'Neill* v. *Leamer*, 93 Neb. 786, 788, from which we have quoted on page 33 of our first brief (Record, p. 157, fol. 258).

A careful examination of the many cases decided by this court discloses that no particular formula is held necessary to present a federal question, but that it is sufficient if, from the record, it reasonably appears that the question was brought to the attention of the state court and decided adversely to the plaintiff in error.

*Daniels* v. *Tearney*, 12 Otto 415, 422, 26 L. ed. 187, 188; *Cornell* v. *Green*, 163 U. S. 75, 41 L. ed. 76, 77.

## II.

## IS THE SO-CALLED PEABODY ACT IN VIOLATION OF SECTION I OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION?

In our first brief we have analyzed the act from pages 55 to 66 and have discussed it in the light of the authorities from pages 77 to 100, and immediately following page 117 have attached a copy as Exhibit "A." From pages 14 to 28 of our second brief we have given a compendium of the act and from pages 28 to 38 thereof have again analyzed it. From pages 38 to 48 of the second brief we have submitted other observations to show the private purpose of the act and its unconstitutionality, and from pages 48 to 71 have presented the question in the light of additional authorities.

The language of the Fifth Amendment to the Federal Constitution that: "No person shall be * *. * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for *public use*, without just compensation," and the language of section 3, article 1 of the

state constitution, that: "No person shall be deprived of life, liberty, or property, without due process of law," and of section 21, article 1 of the state constitution, that: "The property of no person shall be taken or damaged for *public use* without just compensation therefor," means the same thing.

The Fourteenth Amendment made the provisions of the Fifth Amendment applicable to individual citizens of the respective states and conferred jurisdiction upon this court to protect their interests.

It is quite evident that "public use" can not mean one thing in a state constitution and another in the Federal Constitution, and that a use which is not public is not due process of law.

> "Due process of law means the same under all the constitutions, state and federal, including the Fourteenth Amendment."
>
> *The Fourteenth Amendment by Bannon* (1901) 154.

Whether a use is public or private is exclusively a question for this court. If "public use" meant one thing in Nebraska, another in California, another in Maine, another in Florida, and still another when brought to the test of the Federal Constitution, it might be made to mean anything that a state tribunal saw fit to apply to it; and if the decision of a state court were final, this court would be effectually deprived of jurisdiction and thus the Fourteenth Amendment would be destroyed.

In the journal or judgment entry professing to establish the district (Record, p. 51, fol. 81) it is stated: "That the drainage thereof (the lands) will be a public utility and will be conducive to the public convenience, health and welfare and that the expense of such drainage will not be disproportionate to the benefits to be derived therefrom * * *." But neither this nor equivalent language is contained in the petition and articles of association which are the basis thereof, nor in the judgment or journal entry in the instant case (Record, p. 18,

fol. 30). And it is elementary that a judgment broader than the pleading upon which it is based is not *res adjudicata* and is to that extent void.

> "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use,' as found in the different state constitutions regulating the right of eminent domain." *Dayton Mining Co.* v. *Seawell,* 11 Nev. 394, 400; 1 Lewis, Eminent Domain, (3rd ed.) p. 499, sec. 252; 10 Am. & Eng. Ency. of Law, (2nd ed.) 1061.

Whether the state is to be regarded as exercising the right of eminent domain through the instrumentality of a public or a private corporation, or an individual, or as delegating the right to such corporation or person, is probably not material. In either case the inquiry is: Is the use a *public use* as distinguished from a private use? There are numerous reputable authorities holding that where the primary use is public and the secondary is private, the right may be exercised. But it is well established that, "where a proceeding is instituted in which it is sought to exercise the power to condemn property for both public and private uses indiscriminately, that is, where the purposes stated in the petition are part public and part private,—the right to proceed must be denied." *Minnesota Canal & Power Co.* v. *Koochiching Co.* 107 N. W. (Minn.) 405, 5 L. R. A. (N. S.) 638, 646, and cases cited.

It is an established canon of construction that statutes which authorize persons claiming to be a corporation and seeking to exercise the right of eminent domain are to be strictly construed, and nothing is to be taken by implication; while it is equally true that all statutes authorizing the exercise of the right of eminent domain are to be strictly construed.

We have shown in previous briefs that it is not within the rightful authority of a state government to create a corporation and force an individual and his property into corporate relations thereto, except the creation of a municipal or other political or *quasi* political organization. The government of Nebraska is strictly republican in form and all power is dis-

tributed to legislative, executive and judicial departments in conformity to the established American idea, and each department is strictly prohibited from exercising the powers rightfully belonging to other departments (State constitution, article 2, section 1). We therefore contend that the legislature can not authorize the creation of a corporation the primary purpose of which is strictly private, and by calling it a public corporation clothe it with duties that are in no sense public, but confessedly private, and by that means violate the fundamental law of the state and clothe it with the power of eminent domain and make that binding upon the citizen and upon the federal courts. Wherever an attempt is made, as in this case, to do so, this court has jurisdiction to declare that the state tribunal so misconstrued its own law as to violate the right of the individual citizen under the Fourtheenth Amendment.

*Hall* v. *DeCuir,* 95 U. S. 485, 517, 24 L. ed. 547, 552; *Delmas* v. *Merchants' Mutual Insurance Co.,* 14 Wall. 661, 670, 20 L. ed. 757, 759; *Phoenix Insurance Company* v. *Gardiner,* 11 Wall. 204, 210, 20 L. ed. 112, 114; *Olcott* v. *Supervisors of Fon du Lac County,* 16 Wall. 678, 698, 21 L. ed. 382, 386.

It is elementary law (and this is the line of demarcation between a public and private use), that the public use that authorizes the exercise of the right of eminent domain is a public governmental use, that is, a use for some governmental purpose or object as distinguished from a private use, or a use which would be beneficial to a number of persons in promoting their private interests, or in enhancing the value of their estates. A public use must be clearly distinguished from a popular use, or a use which promotes the private interests of many persons.

*Wiesmer* v. *Village of Douglas,* 64 N. Y. 91; *Conneticut College for Women* v. *Calvert,* 89 Conn. 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485, 493; *Varner* v. *Martin,* 21 W. Va. 534; *Bloodgood* v. *Mohawk & Hudson R. R. Co.,* 18 Wend. 9, 52 et seq.; *Sutherland-Innes* v. *Village of Evart,* 86 Fed. 597; *Palairet's Appeal,* 67 Pa. St. 479; *Salisbury Land & Improve-*

*ment Co.* v. *Commonwealth of Massachusetts,* 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196, and cases cited in former briefs.

It is incumbent upon a corporation or person seeking to exercise the right of eminent domain to show both the necessity and the purpose of the use. If it appear that the alleged public purpose or use is merely collateral, and that the real or essential purpose, or use, is to increase the fortunes of individuals, or to enhance the value of their private estates, though the public use might be served incidentally thereby, the taking will not be permitted.

In the light of the authorities cited in our previous brief, it would seem that the unconstitutionality of the act is clearly demonstrated. But a more critical analysis of it may not be out of place. That it was necessary to give it the appearance of being enacted for a public purpose the district to be created under it is spoken of in the body of the act as a public corporation, and it is classified with "counties, townships, villages, and other subordinate public corporations" by the supreme court of Nebraska (Record, p. 157, fol. 259). But that it lacks every essential element of a "county, township, village, or other subordinate public corporation," or governmental agency, is evident at a glance.

In 1881, the legislature of Nebraska passed a drainage act which, with its amendments, is article 1, chapter 19 of the Revised Statutes of 1913, entitled "drainage by county authority." It authorizes the creation of a corporation where "it will be conducive to the public health, convenience or welfare." It is to be brought into being by the petition of one or more land owners addressed to the board of county commissioners, the recognized and established fiscal and executive board of the county, who are to determine whether it is necessary and proper or not. If they find "it will be conducive to the public health, convenience, or welfare," they may establish it under this act. The right of eminent domain may be exercised (Revised Statutes 1913, secs. 1729, 1730).

The second method of creating a drainage district is to be found in article 2, chapter 19 of the Revised Statutes of 1913, entitled "drainage by incorporated companies." Any number of persons, not less than three, may organize the district by signing and filing articles of incorporation and electing directors, and the district may make assessments, surveys, etc., and exercise the right of eminent domain (Revised Statutes, 1913, sec. 1761).

The third method is to be found in article 3, chapter 19 of the Revised Statutes of 1913, under the title, "drainage for agricultural or sanitary purposes by individual land owners." One land owner may initiate the organization by a petition addressed to the board of county commissioners, when it becomes their duty to take certain steps and to inquire into the necessity for the organization. They are to give interested parties a hearing, appoint appraisers, appraise damages, etc., and are, in a word, the exclusive judges of the necessity for the organization. It is invested with the right of eminent domain (Revised Statutes, 1913, sec. 1780).

The fifth method is to be found in article 5, chapter 19 of the Revised Statutes of 1913, entitled "drainage districts organized by vote of the land owners." Such a district may be created "whenever it will be conducive to the public health, convenience or welfare." When the proposed district contains less than twenty persons or corporations, one-fourth of that number, or five, may petition the board of county commissioners for a district; but when there are more than twenty owners, ten or more "owners of real estate therein may sign a petition for the formation of such district." Here also the petition is to be addressed to the board of county commissioners who are to call an election at which the owners may vote upon the question of the organization. If a majority favor it, it becomes established; if not, the project is abandoned. The district may enlarge or diminish its territory and make many changes. It also may exercise the right of eminent domain (Revised Statutes, 1913, sec. 1880).

Owners of swamp lands purchased at swamp land prices, desired to escape from submitting the question of forming a drainage district to the board of county commissioners or to a vote of the inhabitants of the territory to be embraced in it. There was a chance that the county commissioners might find against them or that they might be out voted. They sought to make the owners of contiguous lands bear a part of the burden of taxation and assessments and bonded indebtedness to drain and improve their own lands; their exclusive object was to make their land more productive and therefore more valuable. Under these circumstances it became necessary to induce the legislature to pass another act, and hence we find chapter 116 of the Laws of 1903 (p. 597), which permitted "a majority in interest of the *resident* owners" to begin an action against contiguous but unwilling land owners in the district court and thus force them into corporate relations, duties and obligations they declined to assume. By its provisions the minimum size of the district was to be 640 acres and by section 14 the district board of supervisors was authorized, with the consent of the owners of not less than two-thirds of the whole number of acres, given at an election held for that purpose, "to borrow money and issue bonds therefor on the credit of the district" in "any sum not exceeding six dollars per acre." But the state court having held in *Catron* v. *Dailey*, (May 21, 1909) 84 Neb. 487, 490, that the word "resident" was material and that a non-resident did not come within the provisions of the act, it was necessary that it be repealed and another law passed on the subject. And hence we have chapter 161 of the Laws of 1905, as amended by chapter 147 of the Laws of 1909. It is noticeable that "resident" was stricken out of the sentence "a majority in interest of the *resident* owners" and that the district was reduced from 640 acres to 160 acres, while the right to vote "to borrow money and issue bonds therefor on the credit of the district" was taken away and given to the district board of supervisors.

Having created a means of establishing a district by the act in question, not through the agency of the board of county commissioners nor by an election for that purpose, which is

the first objectionable feature, it is to be observed that it confers legislative power on the district court in violation of section 1, article 2 of the state constitution, which in this case was misconstrued to the prejudice of the plaintiffs and will be reviewed. It is next noticeable that "a majority in interest," which may be a non-resident person or corporation, —the mere owner of the greater number of acres,—may file a paper entitled petition and articles of association in the district court, praying for the organization of the district. "A majority in interest" is entitled to a summons which is to be served on unwilling land owners requiring them to appear and file written objections "why such drainage district should not be organized and declared a public corporation of this state and why their lands will not be benefited by drainage and ought not to be embraced in said drainage district and liable to taxation for draining the same." It is to be remembered at this point that the burden of proof is shifted from "a majority in interest," the petitioner and incorporator, to prove the necessity for the creation of the district, on to contiguous but unwilling land owners to show that their land will not be benefited. This is an unjust and an unnatural thing to do, because it might well be that if the burden of proof rested on "a majority in interest," where it naturally belongs, to show the necessity for the district, and that unwilling land owners would be benefited by it, on an issue made the "majority in interest" might not be able to establish the fact. But the unwilling land owners are not permitttd to contest the right of a "majority in interest" to the incorporation as that is foreclosed by the statute, and the only thing they can do is to assume the burden of proof and establish by a preponderance of the evidence that they will not be benefited by it. An issue is to be framed upon which the unwilling land owners sustain the burden of proof and if on such issue "a majority in interest" can produce witnesse to satisfy the court that the unwilling land owner would be benefited, not that the public would be benefited or that the drainage would promote the public convenience, health and welfare, then a judicial declaration, judgment, or decree,—and the order of the court is

known by these various names in the act,—is to be entered and unwilling land owners forever estopped from questioning the organization and that question becomes *res adjudicata.* By that means and that alone unwilling land owners are bound hand and foot, deprived of their right to protest, and their property is to be encumbered with taxes and assessments and a bonded indebtedness, the far-reaching evil consequences of which is apparent.

As thus organized the district is to pass into the exclusive control of "a majority in interest," or of those owning the greater number of acres. At an election to be held under the direction of the clerk of the district court, five supervisors and a secretary are to be elected (section 5), and this presupposes that five or more land owners are brought into the district. A supervisor whose term of office is five years, is to be elected each year (section 6). After the election the supervisors choose a chairman and secretary and a report of the progress of the organization, including receipts and expenditures, is to be made and published in a newspaper. The supervisors are to receive $2 per day for their services, not exceeding however $80 a year, and are allowed a reasonable amount for clerical assistance. The secretary is to receive compensation to be fixed by the supervisors who are authorized to employ an attorney for the district (section 8). The supervisors are to employ an engineer and cause a topographical survey and map to be made by him (section 9). They are to appoint a drain commissioner to award contracts for the construction of the work, subject to their approval, and he is to report when the work is completed and certify the result to the supervisors who may review and reject or accept it (section 10). If the engineer reports that other lands than those first incorporated in the district will be benefited by the drainage improvements, it becomes the duty of the chairman of the board of supervisors to begin a proceeding in the district court to incorporate the same, and it may be brought into the organization by the order of the judge at chambers and is subject to the same provisions, liabilities and restrictions as the land orginially incorporated.

After the supervisors have agreed on the location and formulated a plan for the organization, they can acquire land by condemnation, either inside or outside of the district, for ditch purposes, and if they are not able to agree with land owners they can, by an order of the county court, obtain three appraisers for that purpose, whose duty it is to award damages and report to the county judge, and the owner is compelled to take the amount of damages awarded him or appeal to the district court; but he gets nothing by his appeal if he fails to increase his damages. He has no right to contest the legality of the organization or the constitutionality of the act under which it is created (section 12). In ten days after the filing of the engineer's report, a meeting of the supervisors is held for the classification of lands "and other property therein." Land owners are given an opportunity to object to the assessment of benefits. The attorney of the district or any land owner may object to the report of the engineer, which objections are to be heard by the supervisors. It is not necessary for the district to file an answer or pleading as such objections are deemed denied, and the district has the right to interpose any matter in defense thereto which it may have (section 14).

The supervisors act as a court to hear the objections. They can subpoena, swear and examine witnesses, and in a word, do everything incident to a hearing and an adjudication of the issues. They may amend and modify the report of the engineer "should such modification be necessary to promote the welfare of the drainage district." They are to classify the lands and property in the district and the amount of benefits which will accrue to each tract "or other property" on the drainage improvement (section 15). The assessment of statutory costs incurred at the trial before the supervisors is drastic and clearly designed to deter land owners from contesting the assessment against their lands, because if they fail they are required to pay all costs (section 16). If they appeal they are not only required to give a bond conditioned as in appeals to the district court from civil actions in justice courts, payable to said drainage corporation, but "in addition thereto

conditioned that they will pay all damages which may accrue to said drainage district by reason of said appeal." When a transcript and an appeal bond have been filed in the district court, there is to be a summary hearing of the case before the judge, a jury not being permitted to determine any question involved, and the judge may increase or reduce the benefits and make an equitable apportionment, after which the clerk certifies the decision to the supervisors who take such action thereon as they deem necessary (section 1). After the classification and adjudication of benefits the board of supervisors may "at once levy a tax on the lands *and other property*" which have been assessed, to carry on the work estimated by the engineer and confirmed by the board. These taxes are to be apportioned to and levied on each tract of land, *or other property* in the district in proportion to the benefits assessed. The tax is to be certified to the county clerk and collected as other taxes under penalty for delinquency (section 18).

The board of supervisors may issue district bonds and provide a sinking fund for their payment, which bonds, after registration and approval by the auditor of public accounts, may be sold on notice given in certain newspapers. They are also invested with power to borrow money to the extent of $5000 and pledge the credit of the district for its payment, and this money is to be expended in the payment of the expenses of the district (sec. 20). Assessments and taxes are liens on the property, which liens are not removable until the taxes are paid, and the property may be sold for their payment, and the state revenue laws are made applicable to their collection (sec. 21). Before the sale of bonds the supervisors are to cause twenty days' notice to be given of the time and place of sale (sec. 22). After they have certified the total levy of the cost and expenses of the project to the county clerk, the supervisors are to proceed to contract for the construction of the ditch and improvements to be done under the direction and to the satisfaction of the drain commissioner, subject, however, to their final approval (sec. 24).

By a strong implication no person is permitted to use the ditch unless his property has been assessed for the cost of its construction (sec. 27). An owner of land in the district may drain through the land of his neighbor, which is in the district, on prosecuting the same kind of a suit in the district court that was commenced for the organization of the district (sec. 28). The county treasurer is *ex officio* treasurer of the district, and the money received is to be paid by him "on warrants signed by the chairman and attested by the secretary," when presented for payment (sec. 29). Section 30 deals with the right of the board of supervisors to compensate others for work "done, and the necessary expenses incurred by any officer, engineer, attorney or other employee," and to pay court fees, etc. The board of supervisors may levy additional assessments for keeping the drains, ditches, etc., in repair (sec. 32).

The collection of assessment and taxes is not to be enjoined or declared void, and no assessment is to be set aside by reason of error, omission, or irregularity in the proceeding, and no injunction is to be allowed restraining the collection of any assessment until the complaining party shall first pay the county treasurer the amount of his assessment, which may be recovered from the district in an action brought for that purpose in case said injunction is made perpetual (sec. 36). And section 38 declares the corporation to be a body politic.

In section 28, by which a land owner in the district is given a right to drain across the land of his neighbor also in the district, it is said that: "The ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, convenience and utility to promote which such drainage district was established." The connection and place of this declaration, as well as the fact that it does not appear in the title of the act as required by section 11, article 3, of the state constitution, conclusively show that it was an afterthought inserted in the original draft on the supposition that it would be binding upon the courts. But "although the legislature may declare it to be public, that

does not necessarily determine its character; it must in fact be public, and if it be not, no legislative fiat can make it so, and any owner of property attempted to be taken for a use really private can invoke the aid of the courts to protect his property rights against invasion" (*Matter of Jacobs,* 98 N. Y. 98, 111). And it is further said in the same case (p. 115), that:

> When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end.

We candidly submit that the measure does not disclose "that the public health is the end actually aimed at," or "that it is appropriate and adapted to that end."

Counsel for the defendants understood the purpose to be private when they said on page 40 of their second brief:

> "This tract when drained will, for agricultural purposes, be more valuable than any other land in the state, as it has been fertilized by the flood water for hundreds of years and has never had its productiveness depleted by cropping."

As a sanitary measure the act is crude, and not as well adapted to promote the "public health, convenience and utility" as the other acts to which reference has been made. But as a measure designed to promote the private interests of "a majority in interest," or the owners of the greatest number of acres, by increasing the productive power of the land and enhancing its value, it is well conceived. This paragraph found in section 3 throws a flood of light on the private character of the organization:

> The fact that said district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of said improvements, and shall be sufficient grounds for declaring said organization a public corporation of this state.

The private nature of the measure is revealed in the fact that "the drainage district by its attorney or any owner of land, *or other property,* * * * whose land *or property* may be affected thereby, may file objections to said report * * *," (sec. 14), and "when said board has adjusted * * * equalized, and determined the classification of and assessment of total benefits to the lands *and other property* * * * as above required they shall enter an order confirming the same * * *" (sec. 15), and in the fact that the "board may at once levy a tax on the lands *and other property* in said district to which benefits have been assessed * * *" (sec. 18). Thus *all property* in the district is taxable for drainage purposes. The defendants' contention, therefore, on page 130 of their second brief, that the tax or assessment is levied against that part only which is "swamp or overflowed lands" is incorrect; and this is likewise evident from the further fact that the district is (record, p. 25, fol. 40) "given by outline of governmental subdivisions." Land in the district a part of which only is swamp or overflowed, *is* made taxable.

Counsel for defendants with becoming candor, concede in their second brief, that if the purpose of the corporation is not to promote the "public health, convenience and utility" (to use the language of sec. 28), it can not be sustained. On page 54 they say: "If the organization is private and if its purpose is private, it can not exercise the right of eminent domain." That it was not created to promote the "public health, convenience and utility" is established by the fact that each land owner has as exclusive possession and absolute control of his estate after it is brought into the district as before; no one can enter or dispossess him, as such person would be a trespasser, and no one can take from him any of the benefits derived from its cultivation. It could not promote the public welfare, and public welfare must mean the public welfare as outlined in the statute, or it means nothing, because the public has no interest in the property. They have no right to enter it or enjoy it or any of the fruits of its production. Counsel are therefore reduced to the necessity of claiming that the purpose is to promote the public health.

If it is a health measure, why was it not organized in one of the ways pointed out in subdivisions 1, 2, 3, and 5 of chapter 19, of the Revised Statutes of 1913?

If a health measure, why was the district limited to a minimum of 160 acres?

If to promote the health, why was the property taxed for "benefits"?

If a health measure, why limit the right to vote to the acreage, regardless of value?

If a health measure, why require the supervisors to live in the district?

If a health measure, why not put it under the control of the board of health (article 5, chapter 27, Revised Statutes of 1913)?

If a health measure, why permit the swamp or overflowed land of any person to escape from being brought into the district by showing "that his real estate, or a part thereof, has been wrongfully included and *will not be benefited thereby*" (sec. 3)?

If a health measure, why permit the court under such circumstances to "exclude such real estate as *will not be benefited*"?

If a health measure, why were steps not taken fifty years ago to drain the land?

If a health measure, why permit non-residents to inaugurate the corporation?

If a health measure, why not permit any resident, regardless of whether he owns real estate or not, to inaugurate it?

If a health measure, why assess the land according to "benefits"?

If a health measure, why terminate the organization in twenty years (record, p. 24, fol. 40, par. 3, of petition and articles of association)?

These and like inquiries disclose the absurdity of the contention.

The case therefore falls within the rule recognized in *Jenal* v. *Green Island Drainage Company*, 12 Neb. 163; *In re Theresa Drainage District*, 63 N. W. (Wis.) 288; *Railroad Company* v. *Commissioners*, 63 Ohio St. 23; *Railroad Company* v. *Keith et al*, 67 Ohio St. 279, 289; *Donnelly* v. *Decker*, 58 Wis. 467, 46 Am. Rep. 637, 17 N. W. 389; *Matter of Ryers*, 72 N. Y. 1; *Fleming* v. *Hall*, 35 N. W. (Ia.) 673; *McQuillen* v. *Hatton*, 42 Ohio St. 202, 204; *In re Schubert*, 114 N. W. (Minn.) 244, 245; *Reeves* v. *Treasurer of Wood County*, 8 Ohio St. 333, 346; *Kinnie* v. *Bare*, 36 N. W. (Mich.) 672, 673, 674; *Anderson* v. *Hill*, 20 N. W. (Mich.) 549, 556; *Wilcox* v. *Paddock*, 31 N. W. (Mich.) 609, 612; *Attorney General ex rel.* v. *McLean*, 109 N. W. (Mich.) 27, 28; *Gifford Drainage District* v. *Schroer*, 145 Ind. 572, 44 N. E. 636; *In re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781; *Priewe* v. *Wisconsin State L. & I. Co.*, 33 L. R. A. (Wis.) 645; *Rutherford's Case*, 72 Pa. St. 82, 13 Am. Rep. 655; *Anderson* v. *Kearns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Nickey* v. *Stearns Ranchos Co.*, 58 Pac. (Cal.) 459; *Butler* v. *Supervisors of Saginaw Co.*, 26 Mich. 22; *The Attorney General* v. *The City of Eau Claire et al.*, 37 Wis. 400; *Zigler* v. *Menges*, 121 Ind. 99, 16 Am. St. Rep. 357; *People ex rel. Pulman* v. *Henion*, 19 N. Y. Supp. 488; *Smith* v. *Atlantic*, 25 Ohio St. 91; *Minnesota Canal & Power Co.* v. *Koochiching Co.*, 107 N. W. (Minn.) 405; *In re Pequest River*, 41 N. J. Laws 175; *Cole* v. *Dooley*, 100 N. W. (Mich.) 561; *Webb* v. *Lucas*, 147 N. W. 273; *Gilbert* v. *Foote*, cited in 5 Barb. (N. Y.) 474, 483; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; *Commercial Bank of Clevcland* v. *City of Iola*, 9 Kan. 469, 2 Dill. 353; *In the Matter of Drainage Along Request River*, 12 Vroom 175; *Request Drainage case*, 12 Vroom 181; *Ryerson* v. *Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Scuffletown Fence Co.* v. *McAllister*, 12 Bush (Ky.) 312, 315, 316, 317; *Savings & Loan Association* v. *Topeka*, 20 Wall. 655, 22 L. ed. 455; *Parkersburg* v. *Brown*, 106 U. S. 487, 27 L. ed. 238, 245; *Cole* v. *LeGrange*, 113 U. S. 1-9, 28 L. ed. 896, 899; *Chicago, Burlington & Quincy R. Co.* v. *Chicago*,

166 U. S. 226-263, 41 L. ed. 979, 994; *West River Bridge* v. *Dix*, 6 How. 507, 12 L. ed. 535, 552; *Missouri Pacific Ry. Co.* v. *Nebraska ex rel. Board of Transportation*, 164 U. S. 403-417, 41 L. ed. 489, 495; *Kaukana Water Power Company* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254-282, 35 L. ed. 1004, 1014; *Osborne* v. *County of Adams*, 106 U. S. 181-183, 27 L. ed. 129; *Cleveland Electric Ry. Co.* v. *City of Cleveland*, 204 U. S. 116-142, 51 L. ed. 399, 411; Cooley's Constitutional Limitations (1903) 768; 2 Farnam, Water & Water Rights, (1914), sec. 170, p. 903; sec. 171, p. 917, 918; sec. 179, p. 951; sec. 181, p. 958; and other cases cited in our first brief on pp. 88, 93, 94, 95; and in our second brief on pp. 63, 64, 65.

We will make no attempt to review *seriatim* the many misconceptions contained in defendants' second brief, some of which are unwarranted deductions, others extraneous, and still others respecting conditions and things of which we can know nothing. The alleged map of Dakota county inserted between pages 90 and 91 containing the outline of the district in red ink, is not correct. No official map has been issued by the county, state or government containing such an outline. It fails to show that about thirty-six acres of Mr. O'Neill's land, or lot five (5), lie to the east or north of Jackson lake, and it improperly gives the meander line *at* Jackson lake, which on the examination of a contour map of the geological survey will be found incorrect. While counsel for the defendants in their second brief admit that the act in question does not provide for an appeal (p. 71) from the judgment of the district court establishing the district, it is said that an appeal could have been taken under section 24, article 1, of the state constitution; but the supreme court of Nebraska has said that: "An appeal is exclusively a statutory right and must be regulated by the statute granting it" (*Nebraska Railway Co.* v. *Van Dusen*, 6 Neb. 160, 161). So that the failure of the act to permit an appeal is another evidence of the sinister purpose of the author of the measure. It is said on page 85 that the statute does not require a notice of the application for the appointment of appraisers, but as the selection of the apprais-

ers was practically an act of the "majority in interest," and it is well settled that an interested person can not use his own agency or authority for such purpose (*Lampher* v. *Mayor et al.*, 4 La. 97, 23 Am. Dec. 477; Cooley's Const. Lim. [7th ed.] 594).

It is stated on page 88 that the Nebraska court did not hold that lot five (5) of Mr. O'Neill's land could be perpetually overflowed, and it is urged that his land does not extend across Jackson lake. But this is incorrect as it is stated in *O'Neill v. Leamer* (Record, p. 158, fol. 260) that: "If the plaintiffs' lands other than those taken by the condemnation proceedings are damaged by this improvement, the law affords them a remedy including the right of appeal to the court of last resort." But the reverse of this is the law in Nebraska (*Republican Valley Railroad Co.* v. *Fink*, 18 Neb. 82, 85, 86).

It is observed on page 120 that the plaintiffs have abandoned their attack on sections 14, 15, 16, and 17 of the act, but this is incorrect owing to the fact that it is averred in the reply: "* * * said sections (14, 15, 16 and 17) * * * as well as said entire act * * * deprive them and each of them of their property without due process of law and deny to them and each of them the equal protection of the law."

On page 128 counsel object to the statement that no bonds of the corporation have been issued, or sold. As the record is silent on the subject, the presumption is that they have not been, and as a matter of fact they were neither registered nor sold February 22, 1915.

Counsel's statement on page 97 as to the number of persons who signed and the number who did not sign the petition and articles of association is not important further than it shows that there was not a majority of *persons* in favor of the organization. An examination of the record will show that they are in error in this respect and that a majority of persons were in opposition to it.

Counsel for defendants cite in their brief cases from Iowa, Illinois and Missouri, but these citations must be read in the

light of the fact that Iowa adopted a constitutional amendment in 1908, specifically providing for private drainage corporations. Missouri adopted such a provision in section 20, article 3, of her constitution, and Illinois in 1878 in section 1, article 4, of her constitution, and New York in 1894 by section 7. But the New York provision was held to be in violation of the Fourteenth Amendment in *In re Tuthill,* 163 N. Y. 133.

If, as we urgently insist, chapter 161 of the Laws of 1905, as amended by chapter 147 of the Laws of 1909, is obnoxious to section 1 of the Fourteenth Amendment to the Constitution of the United States, it must be condemned and is "as if it had never been" (Cooley's Const. Lim., [7th ed.] pp. 259, 260).

Respectfully submitted,

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